

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

77-6027

United States Court of Appeals FOR THE SECOND CIRCUIT

CAPITAL REGION CITIZENS COMMITTEE, THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE, NEW YORK STATE COALITION FOR SANE TRANSPORTATION - N. Y. STATE COST, TOWN OF ROTTERDAM, ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC., a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERG, CHESTER and JANE SNYDER, JOHN K. and MARY E. ALDERSHOFF and GARRETT J. and DELLA M. ALDERSHOFF, WILLIAM F. and WILMA SCHULTZE, ARTHUR W. and JANICE SCOTT, ROBERT G. and MARY LOU SAWYER, and DANIEL T. and DORIS SEIF,

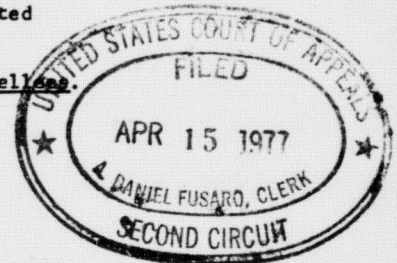
Plaintiffs-Appellants,

-against-

JOHN A. VOLPE, Secretary of Transportation of the United States; GERALD D. LOVE, Regional Federal Highway Administrator of the Bureau of Roads, United States Department of Transportation; ROBERT E. KIRBY, Division Engineer of the Bureau of Roads, Federal Highway Administration, United States Department of Transportation; THEODORE W. PARKER, Commissioner of the Department of Transportation of the State of New York; and CHARLES E. CARLSON, Regional Director, New York State Department of Transportation, Region 1, And each and every one of the foregoing individually as well as in his designated official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



APPENDIX Volume II

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EDITOR'S NOTE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SANE TRANS-
PORTATION - N. Y. STATE COST,
TOWN OF ROTTERDAM,
ST. FRANCIS COMMANDERY HALL ASSOCIATION,
INC., a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZ,
ARTHUR W. and JANICE SCOTT,
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIP,

Plaintiffs,

- against -

72-CV-254

JOHN A. VOLPE, Secretary of Transportation
of the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Adminis-
tration, United States Department of
Transportation;
THEODORE W. PARKER, Commissioner of the
Department of Transportation of the State
of New York; and
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region
1,

And each and every one of the foregoing in-
dividually as well as in his designated
official capacity,

Defendants.

BEST COPY AVAILABLE

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EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

There are pending before me motions for:

- 1) summary judgment dismissing the complaint on behalf of the federal and state defendants.
- 2) a preliminary injunction by the plaintiffs, and
- 3) leave to intervene as defendants by two state contractors.

The application for a preliminary injunction, by agreement of the parties, is to be determined on the basis of the affidavits, exhibits and memoranda of law before the court.¹

THE COMPLAINT

The complaint herein was filed on May 18, 1972 seeking declaratory and injunctive relief with respect to the proposed, and ongoing, construction of what is known either as the Susquehanna Expressway, Interstate Route 508, or I-88 (hereafter I-88).

The Declaratory Judgment Act (28 U.S.C. §§2201 - 2202, the Federal Question statute (28 U.S.C. §1331), the Administrative Procedure Act (5 U.S.C. §§701 - 706), and the Mandamus statute (28 U.S.C. §1361) are alleged as the jurisdictional base. 28 U.S.C. §1391 is pleaded to support venue.

The various causes of action are asserted to arise out of violations of: The National Environmental Policy Act (42 U.S.C. §§4321 et seq.) (hereafter NEPA); the Federal Aid Highway Act (23 U.S.C. §§101 et seq.); The Department of Transportation Act 49 U.S.C. §1651 et seq.); The Federal Clean Air Amendments of 1970 (42 U.S.C. §§1857 et seq.); portions of Title 33 of the United States Code relating to Navigation and Navigable Waterways; New York State Transportation Law §§14, 14-a (McKinney, 1973); New York Environmental Conservation Law §1-0101 (McKinney, 1973); New York State Constitution, Art. XIV, §4 (McKinney Supp, 1973); and the fifth, ninth and fourteenth amendments to the United States Constitution.

Nine separately numbered claims are asserted in

the body of the complaint. The gist of each claim, as alleged in the complaint, is as follows:

First. "Defendant Volpe has arbitrarily and capriciously refused to comply with the requirements of the...[NEPA] in that he has not prepared and circulated the required statement or statements and has not taken measures... to bring the authority and policies, of the Department of Transportation into conformity with the intent, purposes, and procedures of the said Act.²

"In particular, the purported environmental impact statements fail to comply with the requirements of Section 102(2)(c) of the [NEPA] in that:

A. They fail adequately to report the environmental impact of the proposed action, as required by law.

B. The statements do not adequately report with reference to adverse environmental effects which cannot be avoided should the proposal be implemented.

C. The statements fail, notwithstanding the requirement of law, fully to report on consideration of alternatives to the proposed action....

D. They fail adequately to report on the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, in terms of alternate modes of transportation.

E. They fail adequately to report with reference to any irreversible and irretrievable commitments or resources which would be involved in the proposed action should it be implemented.

"Furthermore, the segmented submission procedure of which the aforementioned environmental impact statements are illustrative can in no wise be considered to meet the requirements of the [NEPA] in terms of the detailed statement required, and can in no wise effectively relate to the corridor and regional considerations involved, and to the larger systems of transportation of which these particular segments are but relatively small parts, nor has the required environmental impact statement, prepared by the Federal Department of Transportation in accordance with law, accompanied the proposal through the existing agency review process....³

"The delegation by the defendant Volpe to State or local agencies of the duty to prepare, in draft and final form, the required environmental impact statement required by law to be submitted by the defendant Volpe to the President and the Council on Environmental Quality is ineffective under the law and does not relieve the defendant Volpe of his primary and non-delegable responsibility under the law for fulfilling that function and for the adequacy of the preparation of said statements...."⁴

Second. "...[T]he summary reference to the problem of air pollution in the proposed environmental impact statements does not adequately consider the interrelationship between the construction of more highways, such as the instant project, the Federal Clean Air Amendments of 1970, and the increasing air pollution attendant upon urbanization in the Susquehanna Corridor and particularly in areas, such as the Capital Region, where the geographic configuration, in a sense its relationship to a gigantic topographic bowl, by reason of the tendency to climatic inversion concentrate and intensify air pollution to an unacceptable degree."⁵

Third. "...[T]he State of New York is not in compliance with [...Section 4(f)] of the Department of Transportation Act of 1966... in that it has not undertaken to determine feasible and prudent alternatives to the use of [... public parklands], or otherwise to carry out the requirements of the Federal law protecting and preserving the natural beauty of the countryside and of the specified areas....

"Construction of the project herein without compliance with the terms of Section 4(f)... constitutes arbitrary and capricious action by defendants, and is in violation of law."⁶

Fourth. "On information and belief, in a number of instances, the State of New York has illegally avoided the requirements of public hearing. Proposed locations have been so changed from those presented in the notices or

at the public hearing or hearings with regard to the corridor as to have a substantially different social, economic, or environmental effect; and, on information and belief, no hearing or hearings, as required by law, have been held with regard to such corridor location or as to such changes in location or locations. Original hearings, on information and belief, have not been held as required under Federal law, and the State of New York has ignored or evaded the requirement of Federal law that such hearings be held.

"The failure and refusal of defendants to hold the required hearing or hearings, under the forgoing circumstances and the law, is an abuse of administrative discretion under the law...."⁷

Fifth. "On information and belief...the defendant Volpe has illegally approved the inclusion of the subject project as a part of the national system of interstate and defense highways, for purposes of funding and, unless restrained by this Court, is prepared illegally to disburse Federal funds in connection therewith."⁸

Sixth. "By Section 14 [and 14-a] of the New York State Transportation Law...the Commissioner [of Transportation] is charged with the duty of coordinating and developing comprehensive, balanced transportation for the State, to coordinate and assist in the balanced development and operation of such transportation facilities and services in the State ...[and] with the responsibility of developing transportation

plans and programs to include measures to maintain or enhance the desirable natural characteristics of the land traversed.

"Construction of the proposed project, as planned, without adequate review and consideration of the facts... constitutes arbitrary and capricious action by defendants, and is in violation of applicable New York State law, as aforesaid."⁹

Seventh. "Construction of the proposed project, as planned, without adequate review and consideration of the facts and in patent violation of [Section 1-0101 of] the New York State Environmental Conservation Law, constitutes arbitrary and capricious action by defendants...."¹⁰

Eighth. "...[C]onstruction of the project is violative of the rights of plaintiffs under Section 4 of Article XIV of the Constitution of the State of New York as well as violative of the rights of plaintiffs under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and of due process under the Constitution of the State of New York."¹¹

Ninth. "On information and belief, the Susquehanna, Mohawk and Hudson rivers are navigable waters...[and] the defendants have erected or are preparing to erect bridges, dams, dikes and causeways in such navigable waters, to obstruct such navigable waters generally in terms of excavation and filling in, and to throw, discharge, and deposit, and to

cause, suffer, and procure to be thrown, discharged, and deposited refuse matter into such navigable waters, and into tributaries thereof, and to deposit, cause, suffer, and procure to be deposited material of divers kinds in places on the bank or banks of such navigable waters, and their tributaries, where the same shall be liable to be washed into such navigable waters, all without following the procedures therein set forth and required to be followed"¹²

The complaint then asks for a declaration as to these violations and an injunction permanently enjoining the defendants from proceeding with construction of the project until such violations are cured.

PARTIES

There are twenty plaintiffs, including 15 individuals,¹³ three unincorporated associations,¹⁴ one incorporated fraternal organization,¹⁵ and one municipal corporation;¹⁶ as well as an alleged class.¹⁷ The plaintiffs clearly have standing.¹⁸

There are five defendants, including the federal Secretary of the Department of Transportation (hereafter DOT),¹⁹ the Regional Federal Highway Administrator of the Bureau of Roads of the Federal Highway Administration (hereafter FHWA),²⁰ the Division Engineer of the Bureau of Roads of the FHWA,²¹ the Commissioner of the New York State Department of Transportation (hereafter NY-DOT),²² and the Regional Director

of NY-DOT.²³ All are sued in their official capacities and as individuals and, subject to substitution of parties,²⁴ are proper parties defendant.²⁵

FACTS

The facts forming the basis of the dispositions made herein are derived from approximately 20 affidavits to which there are upwards of 220 exhibits attached.²⁶

Pursuant to a 1968 amendment to the Federal Aid Highway Act, authorizing an additional 500 miles for the Interstate System,²⁷ and the DOT Instructional Memorandum 10-3-68 (dated August 28, 1968)²⁸ implementing this law, NY-DOT, on October 25, 1968, made application for mileage for twenty proposed "links" to the Interstate System which the 500 extra miles was designed to provide.²⁹ One of the proposals granted, though in modified form,³⁰ was the Susquehanna Expressway (I-88). The approval (effective December 13, 1968) was granted only from Binghamton to Schenectady, a distance of approximately 130 miles.³¹

The highway plans divide the 130 miles up into about 25 segments or projects of 2 to 6 miles in length. Proceeding EASTWARD from Binghamton to Schenectady, the segments, identified by their Project Identification Number (PIN), are:³²

<u>PIN</u>	<u>NAME OF AREA</u>
9357.18	I-81 (Binghamton to Route 7)
9357.00	Sanitaria Springs - Martin Hill Road

9357.01	Martin Hill Road - Harpursville
9357.02	Harpursville - Afton
9357.03	Afton - Bainbridge
9357.04	Bainbridge - Sidney (Route 8)
9357.05	Sidney - Unadilla
9357.06	Unadilla - Otego
9357.07	Otego - Oneonta
9357.20	Oneonta (W.City Line to Main St.)
9357.19	Oneonta (Main St. to County Road 47)
9357.08	County Road 47 to Colliersville
9357.09	Colliersville to Maryland
9357.10	Maryland to Schenevus
9357.11	Schenevus to Worchester
9357.12	Worchester to E. Worchester
9357.13	E. Worchester to Richmondville
9357.14	Richmondville to Cobleskill
9357.15	Cobleskill to Shad Point
9357.16	Shad Point to Central Bridge
1357.17	Central Bridge to Schenectady County Line
1357.01	Schenectady Line to Quaker St.
1357.02	Quaker St. to Route 20
1357.03	Route 20 to Route 158
1357.04	Route 158 to Route 890

The map attached to this opinion as Appendix A will clarify the location of these projects.

The statutory and regulatory scheme for the construction of federally assisted highways such as I-88 is built around a plan of four approvals: location, design, environmental, and Plans, Specifications and Estimates (PS&E) approval.

Some or all of these have been granted by the federal authorities with reference to various PINs.

LOCATION and DESIGN APPROVALS

Location and design approval can be considered a two-step process which is governed primarily by Policy and Procedure Memorandum (PPM) 20-8.³³

The original 1958 hearing statute (23 U.S.C. §128) required a hearing, or that an opportunity be provided for one, and a certification to the Secretary that analysis was done on the potential economic effect of the road. In 1968 it was amended to include a requirement that environmental and social effects be studied as well, and in 1970 a further amendment added the requirement of preparing a report on the social, economic and environmental effects.³⁴

PPM 20-8 outlines the procedures to be followed in complying with this statute and calls for a rather complete, formal process with required attendance by all relevant officials, with the right to speak or submit written statements being afforded to all residents of the community in which the hearing is held," and with a requirement that the highway

officials fully explain the important facts about the proposed road, and construction plans, as well as announce the availability or relocation assistance. In addition, other, more informal public meetings are recommended, but not required, by PPM 20-8.³⁵

According to the facts so far before the court, the current status of the entire planned highway project, insofar as the public hearings requirements are concerned, is:

- | | | |
|---|--------------------------------|------------------------|
| A. CORRIDOR HEARINGS HELD: ³⁶ | PIN 1357.01-.04 | (5/27/70) |
| B. OPPORTUNITY FOR CORRIDOR ³⁷
hearings provided; | PIN 9357.18 ^a | (9/69) |
| | PIN 9357.00-.07 ^b | (9/69) |
| | PIN 9357.08-.17 ^c | (9/69) |
| C. CORRIDOR HEARING NOT ³⁸
APPLICABLE: | PIN 9357.20 ^a | |
| | PIN 9357.19 ^b | |
| D. DESIGN HEARINGS HELD: | NONE. | |
| E. OPPORTUNITY FOR DESIGN ³⁹
HEARINGS PROVIDED: | PIN 9357.00 ^a | (6/70) |
| | PIN 9357.01 ^b | (6/70) |
| | PIN 9357.02 ^c | (9/69 & 11/70) |
| | PIN 9357.03 ^d | (11/70) |
| | PIN 9357.04 ^e | (11/70) |
| | PIN 9357.05 ^f | (11/70) |
| | PIN 9357.06 ^g | (3/71) |
| | PIN 9357.07 ^h | (3/71) |
| | PIN 9357.20 ⁱ | (3/66, 5/68
& 8/69) |
| | PIN 9357.19 ^j | (3/66, 5/68) |
| F. DESIGN HEARINGS PENDING: ⁴⁰ | PIN 9357.18 ^a | |
| | PIN 9357.08 - .17 ^b | |
| | PIN 1357.01 - .04 ^c | |

According to the affidavits, one or more requests were received and then subsequently withdrawn in response to corridor hearing opportunity notices in local newspapers for:⁴¹

PIN 9357.18
 PIN 9357.01
 PIN 9357.02
 PIN 9357.03
 PIN 9357.04
 PIN 9357.05
 PIN 9357.06
 PIN 9357.07
 PIN 9357.08 - .17

and one or more requests were made, and subsequently withdrawn in response to design hearing opportunity notices in local newspapers for:⁴²

PIN 9357.02^a
 PIN 9357.03^b
 PIN 9357.04^c
 PIN 9357.06^d
 PIN 9357.07^e

Finally, Location Approval was granted for:⁴³

PIN 9357.18	(2/4/70) ^a
PIN 9357.00	(1/19/70) ^b
PIN 9357.01	(1/19/70) ^c
PIN 9357.02	(2/4/70 or 1/19/70) ^d
PIN 9357.03	(2/4/70) ^e
PIN 9357.04	(2/4/70) ^f
PIN 9357.05	(2/4/70) ^g
PIN 9357.06	(2/4/70) ^h
PIN 9357.07	(2/4/70) ⁱ
PIN 9357.20	Not Applicable ^j
PIN 9357.19	Not applicable ^k
PIN 9357.08 - .17	Pending ^l
PIN 1357.01 - .04	(10/8/72)

and Design Approval was granted:⁴⁴

PIN 9357.18	Pending
PIN 9357.00	(8/70) ^a
PIN 9357.01	(8/70) ^b
PIN 9357.02	(8/70 or 9/70) ^c
PIN 9357.03	(9/24/71) ^d
PIN 9357.04	(8/70 or 9/71) ^e
PIN 9357.05	(8/70 or 9/71) ^f
PIN 9357.06	(9/28/71) ^g
PIN 9357.07	(9/28/71) ^h
PIN 9357.20	(12/3/69) ⁱ
PIN 9357.19	(9/29/67) ^j
PIN 9357.08 - .17	Pending
PIN 9357.01 - .04	Pending

ENVIRONMENTAL APPROVALS

The NEPA mandates the preparation of an environmental impact statement (EIS) by the appropriate agency whenever a "major federal action significantly affecting the quality of the human environment" is contemplated.⁴⁵ The effective date of the statute is January 1, 1970.

To implement NEPA the FHWA prepared a Draft Instructional Memorandum dated 11/24/70.⁴⁶ The provisions, detailing the preparation of an EIS, were said not be applicable to projects receiving design approval before February 1, 1971 (thus adding 13 months to the statutory effective date).⁴⁷ The draft guidelines became final with the transmittal to local offices of PPM 90-1 (dated 8/24/71).⁴⁸ While reiterating the February 1971 effective date of NEPA, PPM 90-1 goes on to change other factors relating to the applicability of NEPA. One such change now made necessary, for all projects which received design approval in an interim period between 1/1/70 and 2/1/71, a written environmental reassessment by the state highway agency which "should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences."⁴⁹ Also, the Federal division engineer was given complete discretion as to whether or not to order an EIS on projects which had received design approval in this interim period.⁵⁰ The reassessment is an informal process that apparently does not contemplate the full-dress treatment intended for Section 102(2)(c) environmental impact

statements recommended by the President's Council on Environmental Quality (CEQ) in its "Guidelines to Federal Agencies".⁵¹

The current status of the entire project, insofar as environmental clearance is concerned, is:

- A. NO ENVIRONMENTAL ANALYSIS: PIN 9357.19⁵²
- B. ENVIRONMENTAL REASSESSMENTS:⁵³
- | | |
|-------------|--------------------------|
| PIN 9357.00 | (4/71) ^a |
| PIN 9357.01 | (4/71) ^b |
| PIN 9357.02 | -.07 (4/71) ^c |
| PIN 9357.20 | (4/12/71) ^d |
- C. ENVIRONMENTAL IMPACT STATEMENTS:⁵⁴
- | | |
|-------------|-----------------------------|
| PIN 9357.02 | (10/21/71) ^a |
| PIN 9357.03 | (10/21/71) ^b |
| PIN 9357.04 | (10/21/71) ^c |
| PIN 9357.05 | (10/21/71) ^d |
| PIN 9357.06 | (10/21/71) ^e |
| PIN 9357.07 | (10/21/71) ^f |
| PIN 9357.08 | -.17 (11/71) ^g |
| PIN 9357.01 | -.04 (3/27/72) ^h |
| PIN 9357.18 | Pending ¹ |

PARKLANDS APPROVAL

Federal law prohibits the taking of public parklands for highway use unless the Secretary of Transportation determines: (1) that there is no feasible and prudent alternative; and (2) that all planning is being done that is possible to minimize harm to the park.⁵⁵ Under the authority of PPM 90-1 a "Section 4 (f) Statement", where appropriate, is prepared and approved together with an EIS. They are in the same document. Two such statements have been made with reference to I-88: On PIN 9357.08 - .17 a Section 4 (f) Statement was prepared for the taking of a 1.4 acre portion of a recreation area in the Town of Richmondville;⁵⁶ and on PIN 9357.19, for

which there was no impact statement prepared, a Section 4 (f) Statement was prepared, and submitted independently, for the taking of a 34 acre portion of Neawha Park in the City of Oneonta.⁵⁷ The adequacy of such 4 (f) Statements is judicially reviewable.⁵⁸ In addition, the plaintiffs allege the failure to file such statements on other portions of I-88.⁵⁹

PLANS, SPECIFICATIONS & ESTIMATES APPROVAL

The last step in the statutory plan is PS&E approval - the point at which the die is cast. Funds cannot be transferred from DOT to NY-DOT until PS&E approval has been granted. PS&E approval is mandated by statute⁶⁰ and governed procedurally by regulations.⁶¹ The date of PS&E approval is the triggering date upon which NEPA applicability hinges.⁶²

The current status of the entire project, insofar as PS&E approval is concerned, is:

A. GRANTED:	PIN 9357.00	(7/5/72) ^a
	PIN 9357.01	(8/16/72) ^b
	PIN 9357.02	(9/27/72) ^c
	PIN 9357.03	(1/2/73) ^d
	PIN 9357.04	(4/18/73) ^e
	PIN 9357.28	(3/28/73) ^f
	PIN 9357.06 :	(5/9/73) ^g
	PIN 9357.20	(8/11/71) ^h
	PIN 9357.19	(3/17/71) ⁱ
B. PENDING:	PIN 9357.18	
	PIN 9357.05	
	PIN 9357.07	
	PIN 9357.08 - .17	
	PIN 1357.01 - .04	

CONSTRUCTION

Actual construction follows PS&E approval. Construction

status of the pertinent PINs is as follows:⁶⁴

<u>Segment</u>	<u>Date Constr. Began</u>	<u>%COMPLETED</u>
PIN 9357.00	9/12/72	36
PIN 9357.01	10/30/72	24
PIN 9357.02	12/18/72	27
PIN 9357.03	3/30/73	53
PIN 9357.04	7/26/73	2
PIN 9357.28	7/16/73	2
PIN 9357.06	7/12/73	4
PIN 9357.20	11/1/71	60
PIN 9357.19	6/14/71	80

The Chronology Table in Appendix B tabulates this pertinent information.

MOTIONS FOR SUMMARY JUDGMENT

Constitutional Claims

The plaintiffs' Eighth claim, alleging the violation of rights secured to them by the 14th Amendment to the United States Constitution, lacks any supporting facts. Neither the 45 page complaint, nor the 95 pages of affidavits, nor the 144 pages of legal memoranda reveal any set of facts^{al} under which a constitution/claim could be made out, or any authority for any of these claims. Summary judgment should be granted in favor of the defendants on this claim.⁶⁵

PENDENT STATE LAW CLAIMS

The plaintiffs' Sixth, Seventh and Eighth claims arise under state statutes⁶⁶ and the state constitution.⁶⁷ The defendants are charged with arbitrary and capricious action in connection with the performance of their duties under the cited statutes. The constitutional violation is

alleged to be a deprivation of due process and equal protection under the state constitution and the Fourteenth Amendment. The state affords remedies for statutory violations⁶⁸ and constitutional violations.⁶⁹

Detailed affidavits have been filed by the state defendants demonstrating compliance with their statutory obligations.⁷⁰ These have not been answered by the plaintiffs. On the basis of these affidavits it appears that there is no substantial issue of fact in relation to claims Sixth and Seventh. Accordingly, summary judgment should be granted in defendants' favor as to those claims.⁷¹

With reference to the alleged constitutional violation, on the face of it it appears to be without substance. Likewise, summary judgment should be granted as to that claim.

Alternatively, even if it were to be found that issues of fact existed as to these state law claims, in the exercise of discretion, I would decline jurisdiction.⁷² It appears to me that any questions that might be raised by these/pendent claims will be incorporated in the disposition of the federally based claims.

REMAINING CLAIMS

In the discretion of the court, it seems more appropriate that the other claims asserted by the plaintiffs be disposed of after a full exploration of the facts on a hearing.⁷³

"(A) thorough probing, in-depth review" is preferable to summary

judgment which is an "unusually inappropriate vehicle for the determination of the issues,"⁷⁴ There should be a trial to explore the probable issues involving environmental analysis, such as (a) whether environmental impact state-
ments should be filed where they are not; (b) whether state-
ments already filed are adequate; (c) whether the state or
federal agency was the party preparing these statements;⁷⁵
(d) whether the segmental submission procedure impedes the
environmental analysis function under NEPA;⁷⁶ and as to the
issues involving hearings: (a) whether hearings should have
been held where they have not been; (b) whether any promises
or threats were made with regard to the withdrawal of requests
for public hearings; and as to the issues involving parklands:
(a) whether more Section 4 (f) Statements need to be prepared;
(b) whether the Section 4 (f) Statements that have been pre-
pared are adequate to authorize a taking, under the statute,
of parklands; and as to the issues involving navigability of
the Susquehanna River, more facts must be put before the court
so that it can determine whether the Susquehanna River is "navigable"
as a matter of law.⁷⁷

PRELIMINARY INJUNCTION

In determining the relief to be afforded on an appli-
cation for a preliminary injunction consideration should be given
to: the probability of success on the merits; irreparable injury
to the movant; injury to the party opposing the motion; and

public interest to be served in granting the injunction.⁷⁸
On balance, the scales tip in favor of granting relief. An examination of the facts in the light of the applicable statutory and regulatory requirements as interpreted by the cases in the Court of Appeals of this circuit indicate a probability of success on at least some of the issues raised. The nature of the injury to the plaintiffs in and of itself makes it irreparable. These factors, together with the public interest to be served by some form of injunctive relief outweigh the injuries claimed by the defendants.

Equity requires different relief for different segments of I-88 depending on the state to which the processing and work had progressed at the time the application for preliminary injunctive relief was made.

The status of the various PINs falls roughly into three groups as follows:

GROUP I

PIN 9357.18
PIN 9357.05
PIN 9357.07
PINs 9357.08 through 9357.17
PINs 1357.01 through 1357.04

These have not received P S and E approval.

GROUP II

PIN 9357.00
PIN 9357.01
PIN 9357.20
PIN 9357.19

These PINs have received P S and E approval and are under

construction but have not had environmental impact statements filed.

GROUP III

PIN 9357.02
PIN 9357.03
PIN 9357.2879
PIN 9357.04
PIN 9357.06

These are PINs for which environmental impact statements were filed and which are not included in Group I or II above.

INJUNCTIVE RELIEF

As to the first group of projects mentioned the federal defendants should be enjoined preliminarily from granting F S and E approval.

As to the second group, restraining the receipt and disbursements of any further federal funds for work beyond the date of this order appears to me to be appropriate under all of the circumstances.⁸⁰

As to the third group of PINs I find that the projects were advanced and prosecuted on the obtaining of P S and E approvals after the filing of environmental impact statements. As to these projects the plaintiff has failed to demonstrate a sufficient probability of success when considered in connection with the relative equities of the parties to justify preliminary injunctive relief.

INTERVENTION

Perini Corporation and Suburban Excavators Inc.,

contractors with the State of New York for the construction of segments of I-88 have moved to intervene in this action. Their motions to intervene are denied. As is indicated above, the action is essentially one seeking enforcement of NEPA and other related legislation in regards to I-88. The state and federal defendants base their defenses essentially on inapplicability of the statute and regulations or asserted compliance with them. They are represented by their respective chief legal officers and staffs.

The principal concern of the proposed intervenors is the enforcement of their contractual rights with the State of New York. This is a proper inquiry for another forum in another day.

Even if the proposed intervenors' interest qualified them to intervene as of right, leave to do so should be denied since such interest in the context of the issues in this case "is adequately represented by existing parties." Rule 24(a) F.R.Civ. P. Permissive intervention should be denied as a matter of discretion. To permit these contractors to intervene would require as a matter of fairness, that any other contractors seeking intervention be permitted the same relief. This obviously would result in "unduly delay[ing] or prejudic[ing] the adjudication of the rights of the original parties." Rule 24(b) F.R.Civ.P.

There appears to be no necessity for the filing of security and the same is dispensed with.⁸¹

This memorandum decision shall constitute the findings of fact and conclusions of law.

For the reasons herein, it is

ORDERED, that summary judgment be and the same hereby is granted dismissing the plaintiffs' Sixth, Seventh and Eighth claims; and that the defendants' motions for summary judgment be otherwise denied; and it is further

ORDERED, that pending the trial and determination of this case, defendants John A. Volpe, Secretary of Transportation, Gerald D. Love, Regional Federal Highway Administrator of the Bureau of Roads of the United States Department of Transportation and Robert E. Kirby, Division Engineer of the Bureau of Roads, Federal Highway Administration, United States Department of Transportation (hereafter federal defendants), their successors, agents, servants and employees be and they hereby are enjoined and restrained from granting P S & E approval to the projects known as:

PIN 9357.18
PIN 9357.05
PIN 9357.07
PIN 9357.08 - .17
PIN 9357.01 - .04

and it is further

ORDERED, that pending the trial and determination of this case, the above-named federal defendants, Theodore W. Parker, Commissioner of the New York State Department of Transportation, Charles E. Carlson, Regional Director of the New York State Department of Transportation, their respective

successors, agents, servants and employees be and they hereby are enjoined and restrained from disbursing any further federal funds, for any work which is performed or materials which are supplied after the date of this order, on the projects known as:

PIN 9357.00
PIN 9357.01
PIN 9357.20
PIN 9357.19

and it is further

ORDERED, that the motions of Perini Corporation and Suburban Excavators, Inc. for leave to intervene be and the same hereby are denied. Said Perini Corporation and Suburban Excavators, Inc., however, are granted leave to appear as amicus curiae on the trial of this action for the purpose of submitting memoranda of law in support of the defendants' position.


United States District Judge

Dated: November 14, 1973
Auburn, New York

Footnotes -

¹ Defendants' counsel stipulated, on return of the argument, to that effect in open court. The Plaintiffs' counsel, after having been requested to appear earlier at the Sept. 28, 1973 motion day in Utica, and though urged to be present for oral argument on a date for which the application was adjourned, the Oct. 29, 1973 motion day in Utica, advised the court by letter dated Oct. 26, 1973 and received by the court on Oct. 29, in Auburn, after the application was heard, that he felt it was not necessary to be present for oral argument and that the entire matter was before the court in the form of memoranda and affidavits. This handicapped me to some extent, because the plaintiffs' attorney could not be questioned on this very complex matter.

² Complaint, Paragraph 11.

³ Complaint, Paragraph 14. 42 U.S.C. §4332(2)(c) provides that all Federal agencies shall:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes:

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

⁴ Complaint, Paragraph 15.

⁵ Complaint, Paragraph 18.

⁶ Complaint, Paragraphs 23, 24. Both the Federal Aid Highway Act (23 U.S.C. §138) and Section 4(f) of the Department of

footnote 6 cont'd p. 27

footnote 6 cont'd -

Transportation Act (49 U.S.C. §1653(f)) provide:

§ 158. Preservation of parklands

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1958, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

7

Complaint, Paragraphs 28, 29. The Federal Aid Highway Act provides for public hearings to be held, or the opportunity provided therefor, on the occasion of any interstate highway building near a community. (23 U.S.C. §128 provides:

§ 128. Public hearings

(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

footnotes cont'd -

- 8 Complaint, Paragraph 31. Approval of I-88 was granted pursuant to 23 U.S.C. 103(e)(1), (3) which provide:

(e) (1) The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

- 9 Complaint, Paragraphs 33, 34, 35. Section 14 of the Transportation Law provides, in part:

§ 14. General functions, powers and duties of department

The department, by or through the commissioner or his duly authorized officer or employee, shall have the following general functions, powers and duties:

1. To coordinate and develop comprehensive, balanced transportation policy and planning for the state to meet the present and future statewide needs for adequate, safe and efficient transportation facilities and services at reasonable cost to the people;
2. To coordinate and assist in the balanced development and operation of such transportation facilities and services in the state, including highway, mass transit, marine and aviation facilities;
3. To develop policies and proposals designed to help meet and resolve the special problems of urban and commuter transportation in metropolitan areas throughout the state and the special problems of transportation of other areas of the state.
4. To make such studies and analyses of transportation problems as the commissioner may deem appropriate or as may be

footnote 9 cont'd p. 29

footnote 9 cont'd -

requested by the governor relating to any aspect of transportation in the state.

5. To consult with and co-operate with

(a) officials of departments and agencies of the state having duties and responsibilities concerning transportation.

(b) officials and representatives of public corporations as defined in article one, section three of the general corporation law;

(c) official representatives of the federal government, of neighboring states and of interstate agencies on problems affecting transportation in this state;

(d) officials and representatives of carriers and transportation facilities and systems in the state;

(e) persons, organizations and groups utilizing, served by, interested in or concerned with transportation facilities and systems in the state.

Section 14-a provides:

The commissioner of transportation shall cooperate and consult with the commissioners of agriculture and markets, parks and recreation, environmental conservation and health in developing transportation plans and programs so that such programs include measures to maintain or enhance the desirable natural characteristics of the land traversed. Such cooperation and consultation shall be effected and implemented by memoranda of understanding which shall be entered into between the com-

missioner of transportation and each of such commissioners. Such memoranda of understanding shall provide for review of proposed transportation projects by such commissioners at all stages of progress, including preliminary and final planning and during construction, and for the cooperation by the department of transportation necessary to facilitate such review. Such memoranda of understanding shall also provide that the commissioner of transportation shall implement any suggestion or recommendation made by any of such commissioners which he deems feasible in connection with the preservation of agricultural lands, lands of public parks and recreational areas, wildlife and waterfowl refuges and historical sites.

footnotes cont'd -

10 Complaint, Paragraph 38. Section 1-0101 provides:

1 The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.

2 It shall further be the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and the concerned individual, and to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

3 It shall further be the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations by:

- a. Assuring surroundings which are healthful and aesthetically pleasing;
- b. Guaranteeing that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintended consequences;
- c. Promoting patterns of development and technology which minimize adverse impact on the environment;
- d. Preserving the unique qualities of special resources such as the Adirondack and Catskill forest preserves.
- e. Providing that care is taken for the air, water and other resources that are shared with the other states of the United States and with Canada in the manner of a good neighbor.

11 Complaint, Paragraph 41. Article XIV, Section 4 of the New York State Constitution provides:

footnote 11 cont'd p. 31

footnote 11 cont'd -

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

- 12 Complaint, Paragraphs 43, 44. Certain permits are required under 33 U.S.C. §401 for bridges and other work involving navigable waterways. Related claims allege that such proposed bridges constitute illegal obstructions (33 U.S.C. §403); shall, during construction, occasion the illegal depositing of refuse (33 U.S.C. §407); shall give rise to the State defendants incurring penalties (33 U.S.C. §411); that the plans for proposed bridges must be submitted to federal officials (Army Corps/Engineers) for prior approval (33 U.S.C. §491); as well as to the appropriate State Highway Department for approval (33 U.S.C. §525).
- 13 Daniel and Doris Seip, Robert and Mary Lou Sawyer, Arthur and Janice Scott, William and Wilma Schultz, Garrett and Della Aldershoff, John and Mary Aldershoff, Chester and Jane Snyder, and John Keseberg, owners of property in the area.
- 14 Capital Region Citizens Committee, The Richmondville Property Owners Committee, New York State Coalition For Safe Transportation (COST), unincorporated civic organizations.
- 15 St. Francis Commandery Hall Association, Inc. (a/k/a Knights of St. John), an interested property owner.
- 16 Town of Rotterdam. The Town of Princetown was originally named as plaintiff but, since this action was apparently unauthorized, a stipulation was entered into by all parties removing it and amending the caption.
- 17 Complaint, Paragraph 2. It is not necessary to determine class action status at this time.

footnotes cont'd -

- 18 See Sierra Club v. Morton, 405 U.S. 727 (1972); Citizen's Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2nd Cir. 1970), cert.den. 400 U.S. 949 (1970). See, also, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).
- 19 John Volpe who, together with defendants Love and Kirby (see notes 20, 21) are referred to as federal defendants.
- 20 Gerald Love.
- 21 Robert Kirby.
- 22 Theodore Parker who, together with defendant Carlson, (see note 23) are referred to as state defendants.
- 23 Charles Carlson.
- 24 John A. Volpe has been replaced by Claude S. Brinegar as Federal Secretary of Transportation and Theodore W. Parker as been replaced by Raymond T. Schuler as State Commissioner of Transportation.
- 25 Ex Parte Young, 209 U.S. 123 (1908) See Pa. Environmental Council v. Bartlett, 454 F.2d 613, 624-625 (3rd. Cir. 1971).
- 26 Affidavits before the court on behalf of the defendants include those of:

Frederick Memott	(8/17/72)
Robert Kirby	(7/21/72)
Donato Altobelli	(8/23/72)
J. J. Barakos	(8/24/72; 11/21/72; 9/19/73)
Raymond Schuler	(9/24/73)
James Cullem, esq.	(9/25/73)
Douglas Dales, esq.	(6/7/72; 7/19/72; 10/18/73).

Affidavits on behalf of plaintiffs include those of:

Herbert Posner	(10/24/72; 7/27/73; 10/5/73; 10/25/73)
John LaBarca	(10/24/72)
William Hoppen	(10/24/72); (10/25/73)
Mildred Racko	(10/17/72)

There are 93 exhibits affixed to the Kirby Affidavit, 134

exhibits affixed to the Memott Affidavits and various other exhibits attached to other affidavits,)

- 27 See, supra, Note 8; Affidavit of Posner (1972).
- 28 Kirby Affidavit, Exhibit 2.
- 29 Kirby Affidavit, Exhibit 1.
- 30 Originally proposed was a \$264. million, 145 mile road to run from Binghamton to the Vermont State line.
- 31 Kirby Affidavit, Exhibit 4.
- 32 Memmott Affidavit, Exhibit 2. See Map attached to this opinion as Appendix A (taken from Memmott Exhibit 6, Kirby Exhibit 1).
- 33 PPM 20-8 was originally promulgated in 1958 (Kirby Exhibit 10) to provide the necessary guidance to Regional offices of the Bureau of Public Roads (now the Federal Highway Administration (FHWA) for granting the public hearings mandated by 23 U.S.C. §128 (see note 7, supra). It was revised in 1959 (Kirby Exhibit 11) and in 1969 (Kirby Exhibit 5). The most recent PPM 20-8, effective 5/9/73, provides:

§ 790.3 Definitions.

As used in this part:

(a) A "corridor public hearing" is a public hearing that:

(1) Is held before the route location is approved and before the State highway department is committed to a specific proposal, except as provided in § 790.5(g).

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations and the social, economic, and environmental effects of these alternate locations.

(b) A "highway design public hearing" is a public hearing that:

(1) Is held after the route location has been approved, but before the State highway department is committed to a specific design proposal, except as provided in § 790.5(g).

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate

footnote 33 cont'd -

In addition, PPM 20-8 described the prerequisites for location and design approval as:

(a) The following requirements apply to the processing of requests for highway location or design approval:

(1) Location approval. The State Engineer may approve a request for location and authorize design studies only after the following requirements have been met:

(i) The State highway department has requested route location approval.

(ii) Corridor public hearing requirements by this part have been held, or the opportunity for hearings has been afforded.

(iii) The State highway department has submitted public hearing transcripts and certificates required by section 126, title 23, United States Code.

(iv) The requirements of this part and of other applicable laws and regulations.

(2) Design approval. The Division Engineer may approve the Highway Design and authorize right-of-way acquisition, approve right-of-way plans, approve construction plans, specifications, and estimates, or authorize construction, only after the following requirements have been met:

(i) The route location has been approved.

(ii) The State highway department has requested highway design approval.

(iii) Highway design public hearings required by this part have been held, or the opportunity for hearings has been afforded.

(iv) The State highway department has submitted the public hearing transcripts and certificates required by section 126, title 23, United States Code.

(v) The requirements of this part and of other applicable laws and regulations.

23 C.F.R. Part 790 (1973 Rev.).

34 The 1969 revision of PPM 20-8 provided, in part:

(a) Pre-September 29, 1972. State highway departments shall consider social, economic, and environmental effects before submission of requests for location or design approval, whether or not a public hearing has been held. Consideration of social, economic, and environmental effects shall include an analysis of information submitted to the State highway department in connection with public hearings or in response to the notice of the location or design for which a design approval is requested. It shall also include consideration of information developed by the State highway department or gained from other contacts with interested persons or groups.

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footnote 34 cont'd on p. 35

(b) *Modified guidelines—Post-September 29, 1972—*(1) *Application.* These modified guidelines apply to projects which have not received FHWA approval as of September 29, 1972. They do not apply to projects which are already in various stages of physical construction or are exempt under the emergency provisions of § 790.2(c).

For more recent procedures, including the new requirement that a report be filed, see 23 C.F.R. Part 1.38, Appendix A, pp. 56-61 (codifying Instructional Memo 20-4-72, pub. at 37 F.R. 21,430 (10/11/72); PPM 90-4, pub. at 37 F.R. 21,431 (10/11/72)).

35 Paragraph 5 (b) of PPM 20-8 provides:

(b) Other public hearings or informal public meetings, clearly identified as such, may be desirable either before the study of alternate routes in the corridor begins or as it progresses to inform the public about highway proposals and to

obtain information from the public which might affect the scope of the study or the choice of alternatives to be considered, and which might aid in identification of critical social, economic and environmental effects at a stage permitting maximum consideration of these effects. State highway departments are encouraged to hold such a hearing or hearings whenever that action would further the objectives of this part or would otherwise serve the public interest.

36 Memmott Affidavit, page 15, 24. Kirby ¶11.

37 (a) Kirby ¶8 Memmott P. 24
(b) Kirby ¶8 Memmott P. 24
(c) Kirby ¶10 Memmott P. 24

38 (a) See Footnote 39(1); Kirby ¶19 Memmott P. 24
(b) Kirby ¶20 Memmott pp. 11-12, 24

39 (a) Kirby ¶15 Memmott P. 24
(b) Kirby ¶15 Memmott P. 24
(c) Kirby ¶16 Memmott P. 24
(d) Kirby ¶16 Memmott P. 24
(e) Kirby ¶17 Memmott P. 24
(f) Kirby ¶17 Memmott P. 24
(g) Kirby ¶18 Memmott P. 24
(h) Kirby ¶18 Memmott P. 24

footnote 39 cont'd -

- (i) Kirby ¶9, 19 Memmott P. 24
- (j) Kirby ¶9 Memmott P. 24
- 40 (a) Kirby ¶14 Memmott, P. 9, 24
- (b) Kirby ¶21 Memmott P. 23, 24
- (c) Kirby ¶21 Memmott P. 23, 24
- 41 Memmott P. 24
- 42 (a) Kirby ¶16
- (b) Kirby ¶16
- (c) Kirby ¶17
- (d) Kirby ¶17
- (e) Kirby ¶18
- 43 (a) Memmott P. 9
- (b) Kirby ¶12
- (c) Kirby ¶12
- (d) Kirby ¶12 Memmott P. 10
- (e) Kirby ¶12 Memmott P. 10
- (f) Kirby ¶12 Memmott P. 10
- (g) Kirby ¶12 Memmott P. 10
- (h) Kirby ¶12 Memmott P. 10
- (i) Kirby ¶12 Memmott P. 10
- (j) Kirby ¶13
- (k) Kirby ¶13, 20 Memmott PP 11-12
- (l) Barakos, II, ¶10
- 44 (a) Kirby ¶15 Memmott P. 10, 21
- (b) Kirby ¶15 Memmott P. 10, 21
- (c) Kirby ¶16 (9/24/71) Memmott P. 10
- (d) Kirby ¶16 (9/24/71)
- (e) Kirby ¶17
- (f) Kirby ¶17
- (g) Kirby ¶18
- (h) Kirby ¶18
- (i) Kirby ¶19 Memmott P. 21
- (j) Kirby ¶20 Memmott PP. 11-12
- 45 See, supra, Note 3.
- 46 Kirby Exhibit 58. See, also, DOT Order 5610.1 (dated 10/7/70), appendix B of Kirby Exhibit 58.
- 47 An extention in excess of the regulatory authority. See Conservation Society of Southern Vermont v. Volpe, 343 F. Supp. 761, 767 (D.Vt. 1972); Committee to Stop Route 7 v. Volpe, 346 F.Supp. 731, 737 (D.Conn. 1972).
- 48 Kirby Exhibit 53. Although PPM 90-1 was revised on Sept. 7, 1972 (Kirby Exhibit 1) no major changes were made.

footnotes cont'd

49 PPM 90-1, Paragraph 5 states:

5. Application. a. An environmental statement or combined environmental/section 4(f) statement or negative declaration, whichever is appropriate, shall be prepared and processed in accordance with this memorandum for each highway section proposed for construction with funds administered by the FHWA, including in appropriate cases any section financed from funds transferred to the FHWA from other agencies, which receives or received design approval (see paragraph 5e) on or after February 1, 1971.

b. An environmental statement or combined environmental/section 4(f) statement, whichever is appropriate, shall be prepared and processed in accordance with this memorandum for each highway section which received design approval on or after January 1, 1970, and before February 1, 1971, and which constitutes a major action significantly affecting the environment (see Appendix F, paragraphs 2 and 3) if, in the judgment of the FHWA division engineer, implementation of the National Environmental Policy Act to the fullest extent possible requires preparation and processing of an environmental statement. In making his judgment the FHWA division engineer should consider, in addition to the written reassessment prepared by the EA (see paragraph 5e) for each such highway section, the status of the design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway.

c. Highway sections which received design approval on or after January 1, 1970, and before February 1, 1971, that are classed as a major action are to be reassessed by the EA in consultation with the FHWA division engineer or his representative. The written reassessment should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences.

23 CFR §1.38 App. A, P. 63 (1973 rev.)

50 See, note 49, supra. Such a discretionary decision appears to have been made as to PIN 9357.02 for which, first a reassessment, then a full EIS was prepared, although design approval predated Feb. 1, 1971.

51 36 F.R. #72, Part II (April 23, 1971).

52 Kirby ¶30 Memmott PP. 11-12

53 (a) Kirby ¶27 Memmott P. 10
 (b) Kirby ¶27 Memmott P. 10
 (c) Memmott P. 10
 (d) Kirby ¶29 Memmott P. 11

footnotes cont'd -

- 54 (a) Kirby ¶28 Memmott P. 10, 20
(b) Kirby ¶28 Memmott P. 10, 20
(c) Kirby ¶28 Memmott P. 10, 20
(d) Kirby ¶28 Memmott P. 10, 20
(e) Kirby ¶28 Memmott P. 10, 20
(f) Kirby ¶28 Memmott P. 10, 20
(g) Kirby ¶31 Memmott PP. 12-15, 20/Barakos II ¶8
(h) Kirby ¶32 Memmott PP. 15-17, 20/Barakos II ¶9
(i) Kirby ¶24 Memmott P. 9, 20
- 55 See, supra Note 6.
- 56 Memmott Affidavit, pp. 13-14.
- 57 Kirby Affidavit, Paragraph 34.
- 58 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)
- 59 Plaintiffs' 10/27/72 Memo of Law in Opposition to Summary Judgment, pp. 60-64; citing The Interior Department Comments to impact statement for PIN 9357.08-,17, located in Memmott Exhibit 54, pp. 1-2, 5, 8-9.
- 60 23 U.S.C. §106(a) (1958).
- 61 23 C.F.R. §1.10 (1973 Rev.).
- 62 Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2nd Cir. 1972) and cases cited. NEPA applies if PS&E approval is granted after 1/1/70, its effective date, but not if granted before.
- 63 (a) Kirby ¶15
(b) Barakos II, ¶12
(c) Barakos II, ¶13; Barakos III, ¶5.
(d) Barakos III, ¶6
(e) Barakos III, ¶8
(f) Barakos III, ¶7. This is a new project, apparently carved out of PIN 9357.04. See Oral Argument, comment by Mr. Dales (10/29/73).
(g) Barakos III, ¶9
(h) Kirby ¶19
(i) Kirby ¶20.
- 64 Dales Affidavit (10/18/73) Appendix A. See also Barakos Affidavit III, 9/19/73.
- 65 Rule 56(b) F.R.Civ.P.

footnotes cont'd -

- 66 Supra, notes 9, 10
Of three suits to arise in state courts under these four provisions of New York law, only one lower court opinion suggests that the actions of the Environmental Conservation (ENCON) Commissioner are subject to searching judicial enquiry. Hamilton v. Diamond, 70 Misc. 2d 899, 355 N.Y.S. 2d 103 (1972).
- 67 Supra note 11.
- 68 N.Y. CPLR Article 78. (McKinney, 1963).
- 69 N.Y.S. Constitution, Art. XIV, §5 (McKinney, 1973 Supp.)
- 70 See Affidavits of Memmott, Altobelli, Barakos I (8/24/72).
- 71 Rule 56(b) F.R.Civ.P.
- 72 United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). See, Leather's Best v. Mormaclynx, 451 F.2d 800, 809-811 (2nd Cir. 1971).
- 73 See, 6 J. Moore, Federal Practice Para. 56.24 at 2872; and Para. 56.15, at 2291 (2nd ed. 1972). See also, 10 Wright & Miller, Federal Practice and Procedure Civil §2728, at 554 and cases cited, n. 47 (1973).
- 74 Monroe County, supra, 472 F.2d at 700.
- 75 See Green County Planning Board v. Federal Power Commission, 455 F.2d 412 (2nd Cir. 1972), cert.den. 409 U.S. 849 (1972); Life of the Land v. Brinegar, 5 E.R.C. 1780 (9th Cir. 1973); Finish Altoona's Interstate Right, Inc. v. Volpe, 355 F. Supp. 933 (N.D.Ga. 1973), aff'd per curiam (5th Cir. Aug. 31, 1973); Citizens Environmental Council v. Volpe, 4 E.R.C. 1970 (D.Kan. 1972), aff'd (10th Cir. Sept. 19, 1973). See, also, Conservation Society of Southern Vermont v. Volpe, 362 F. Supp. 627, 629-632 (D.Vt. 1973); National Forest Preservation Group v. Volpe, 352 F. Supp. 123 (D.Mont. 1972); Iowa Citizens For Environmental Quality, Inc. v. Volpe, 4 E.R.C. 1755 (S.D. Iowa 1972).
- 76 See Conservation Society of Southern Vermont, 362 F. Supp. at 636-638; Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 739-741 (D.Conn. 1972); Movement Against Destruction v. Volpe, 361 F. Supp. 1360 D.Md. 1973) and cases cited.

footnotes cont'd -

- 77 The determination of navigability is a mixed question of law and fact to be determined by a court. U.S. v. Appalachian Electric Power Co., 311 U.S. 377 (1940); See Monroe County, supra at 702-703.
- 78 See Checker Motors v. Chrysler, 405 F.2d 319 (2nd Cir. 1969, cert.den. 394 U.S. 999 (1969)); Gulf and Western v. the Great A. & P. Tea Co., 476 F.2d 687 (2nd Cir. 1973); Citizen's Committee For the Hudson Valley v. Volpe, 297 F. Supp. 804 (S.D.N.Y. 1969); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971).
- 79 It is being assumed that the newly designated 9357.28 received environmental attention since it was originally part of PIN 9357.04, although this is unclear. (See Footnote 63(f)).
- 80 State Commissioner of Transportation Schuler has advised the court, by affidavit of Sept. 24, 1973, that the State of New York can and will, if necessary, build I-88 without Federal funds. See Schuler Affidavit, page 6.
- 81 See Powelton Civic Home Owners Ass'n v. H.U.D., 284 F. Supp. 809, 839-841 (E.D.Pa. 1968).

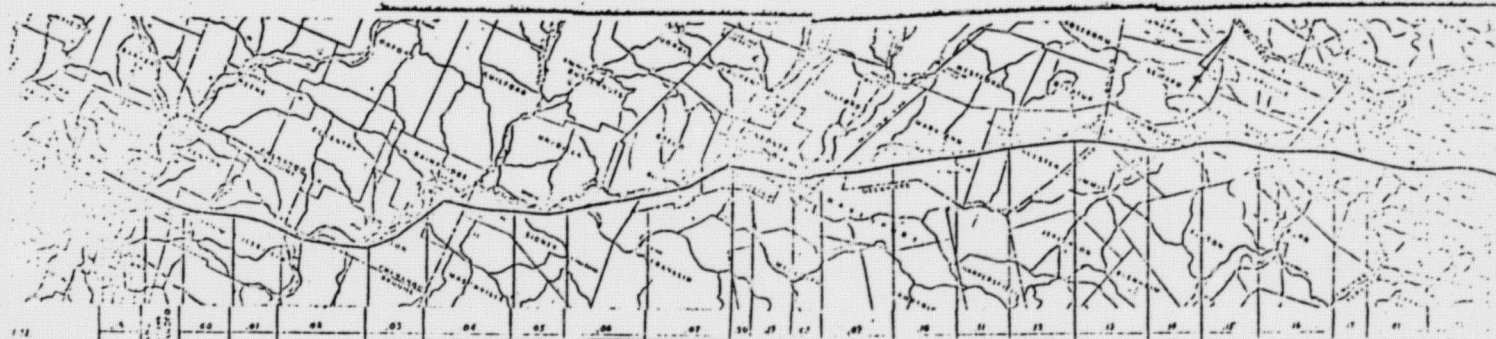
	9357.18	9357.00	9357.01	9357.02	9357.03	9357.04	9357.05	9357.06	9357.07	9357.20	9357.19	9357.08-.19	1357.01-.04
LOCATION APPROVAL	2/4/70	1/19/70	1/19/70	1/19/70 + 2/4/70	2/4/70	2/4/70	2/4/70	2/4/70	2/4/70	NA	NA	PENDING	11/8/72
DESIGN APPROVAL	PENDING	8/70	8/70	8/70 + 9/70	9/28/71	9/28/71	9/28/71	9/28/71	9/28/71	12/3/69	9/29/67	PENDING	PENDING
ENVIRONMENT REASSESSMENT	—	4/71	4/71	4/71	—	—	—	—	—	9/12/71	NA	—	—
ENVIRONMENT IMPACT STATEMENT	PENDING	NA	NA	10/21/71	10/21/71	10/21/71	10/21/71	10/21/71	10/21/71	NA	NA	11/71	3/27/72
PLANS SPECIFICATIONS ESTIMATES APPROVAL	PENDING	7/5/72	8/16/72	9/27/72	1/2/73	4/18/73 12/12/72 3/28/73	PENDING	5/9/73	PENDING	8/11/71	3/7/71	PENDING	PENDING
CONSTRUCTION STARTED	—	9/12/72	10/30/72	12/18/72	3/30/73	7/26/73 7/16/73	—	7/12/73	—	11/1/71	6/10/71	—	—
% COMPLETED	—	36	24	27	53	2/2	—	4	—	60	80	—	—

I-88 CHRONOLOGY OF EVENTS

APPENDIX B

NOTES:

* Now 1357.28/sep Note (S)
 * 9357.02 was split for some of the approvals.



Interstate 90
Highway 101 to Schenck's Route

1° e 6 ottobre

A320

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR BAME TRANSPORTATION -
N. Y. STATE COST,
TOWN OF ROTTERDAM,
TOWN OF PRINCETOWN,
ST. FRANCIS CONVENTUARY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESSEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZ,
ARTHUR W. and JANICE SCOTT,
ROBERT G. and MARY LOU SMYER, and
DANIEL T. and DORIS SEIP,

Plaintiffs,

- against -

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads,
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department
of Transportation of the State of New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individu-
ally as well as in his designated official
capacity,

Defendants.

CIVIL ACTION
FILE NO.
72-CV-254

MOTION TO MODIFY
PRELIMINARY INJUNCTION

The defendants, Raymond T. Schuler, Commissioner of
Transportation of the State of New York, and Charles E. Carlson,
Regional Director, New York State Department of Transportation,
Region 1, move the Court for a modification of its Memorandum
Decision and Order dated November 14, 1973, which granted a
preliminary injunction, to permit federal participation in
funding of projects PINS 9357.03 through 9357.17, in Otsego and
Schoharie Counties, upon the affidavit of Raymond T. Schuler,

- 2 -

sworn to April 12, 1976, upon the affidavit of Douglas S. Dales, Jr., sworn to April 16, 1976, and upon all the papers and proceedings heretofore had herein.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants
Schuler and Carlson
Office and P. O. Address
The Capitol
Albany, New York 12224

By: s/ Douglas S. Dales, Jr.
DOUGLAS S. DALES, JR.
Assistant Attorney General
Telephone: (518) 474-7284

NOTICE OF MOTION

TO: ROBERT J. KAPIN, ESQ.
Attorney for Plaintiffs
Office and P. O. Address
115 Maple Street
Glens Falls, New York 12001

HON. JAMES M. SULLIVAN, JR.
United States Attorney
Office and P. O. Address
U. S. Post Office & Court House
Albany, New York 12201

WILLIAM HOPPEN, ESQ.
Attorney for The Richmondville
Property Owners Committee
and New York State Coalition
for Safe Transportation
Office and P. O. Address
Ardsley-on-Hudson, New York
10503

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before this Court at the Federal Building, Syracuse, New York, on May 10, 1976, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

DATED: April 16, 1976

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants
Schuler and Carlson
Office and P. O. Address
The Capitol
Albany, New York 12224

By: s/ Douglas S. Dales, Jr.
DOUGLAS S. DALES, JR.
Assistant Attorney General
Telephone: (518) 474-7284

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SAME TRANSPORTATION -
N. Y. STATE COST,
TOWN OF ROTTERDAM,
TOWN OF PRINCETOWN,
ST. FRANCIS CONVENTERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESSEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA H. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZ,
ARTHUR W. and JANICE SCOTT,
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIP,

Plaintiffs,

- against -

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads,
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department
of Transportation of the State of New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individu-
ally as well as in his designated official
capacity,

Defendants.

CIVIL ACTION
FILE NO.
72-CV-254

AFFIDAVIT IN SUPPORT OF
MOTION TO REPEAL
PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DOUGLAS S. DALES, JR., being duly sworn, deposes and
says:

1. I am an Assistant Attorney General of the State of
New York. I was assigned to the defense of this litigation at

the outset and am fully familiar with the facts and circumstances herein. I make this affidavit in support of defendants Schuler's and Carlson's motion to modify this Court's injunction dated November 14, 1973.

2. This motion seeks a modification of this Court's order of November 14, 1973, to permit the project to progress with federal participation with respect to PINS 9357.08 through 9357.17. The basis for seeking this relief, briefly stated, is the completion and approval of the EIS which was made a part of Commissioner Schuler's affidavit dated December 11, 1975, coupled with the EIS already before this Court as Exhibit 133, which was made a part of the Mommott affidavit dated August 17, 1972. Exhibit 133 deals specifically with the PINS which are the subject of this motion. As the affidavit of Commissioner Schuler points out, Exhibit 133 received FHWA approval on August 8, 1972. As noted in the affidavit of J. J. Barakos, dated November 21, 1972, submitted to this Court by the FHWA in connection with the defendants' motion for summary judgment, Secretary Volpe approved the revised combination EIS/Section 4(f) determination on October 13, 1972 (See Exhibit 2, Barakos affidavit). Notice of availability of that document was duly published beginning November 1, 1972 (See Exhibit 3, Barakos affidavit).

3. Attached hereto and made a part hereof are the following Appendices:

"A" - Letter dated December 1, 1972, from FHWA Division Engineer to NYSDOT, Planning Division, granting location approval for PINS 9357.08 through 9357.17;

"B" - Letter dated December 6, 1972, from FHWA Division Engineer to NYSDOT, Planning Division, granting approval of reconstruction of Route 10 as part of the I-88 project;

"C" - Letter dated January 5, 1973, from
- Deputy Assistant Secretary of Interior to NYSDOT advising of §4(f) approval for PINS 9357.08 through 9357.17.

The Council on Environmental Quality published a Notice of Availability of Final Environmental Impact Statement on

- 3 -

October 24, 1972, in 37 Federal Register 23664, for the EIS relating to PINS 9357.08 through 9357.17. On February 27, 1976, CEQ published a Notice of Availability of Final Environmental Impact Statement, in 41 Federal Register 8528, for the EIS which was attached to the December 11, 1975 Schuler affidavit. The Design Public Hearings have been held (See Schuler affidavit 4-12-76, page 10).

4. Based upon the foregoing and the Schuler affidavit dated April 12, 1976, it is apparent that the previous objections to the progressing of this project have been obviated.

WHEREFORE, it is respectfully requested that this Court's order dated November 14, 1973, be modified to permit federal financial participation in the projects denominated PINS 9357.08 through 9357.17.

s/ Douglas S. Dales, Jr.
DOUGLAS S. DALES, JR.

Sworn to before me this
16th day of April, 1976.

s/ Kenneth E. Page
KENNETH E. PAGE
Notary Public
Qualified in Rensselaer County
Commission Expires March 30, 1977

April 8, 1976

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SANE TRANSPORTATION -
N. Y. STATE COST,
TOWN OF ROTTERDAM,
TOWN OF PRINCETON,
ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESSEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELIA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULZE,
ARTHUR W. and JANICE SCOTT
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIP,

Plaintiffs,

- against -

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads,
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department
of Transportation of the State of New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individu-
ally as well as in his designated official
capacity,

Defendants.

CIVIL ACTION
FILE NO.
72-CV-254

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

RAYMOND T. SCHULER, being duly sworn, deposes and says:

1. I am the Commissioner of Transportation of the State of New York.
I make this affidavit in support of an application to modify this Court's
Memorandum-Decision and Order dated November 14, 1973, which granted a pre-
liminary injunction barring the Federal defendants from granting Plans,
Specifications and Estimates approval for certain I-88 projects. Among the
projects to which this specific section of the preliminary injunction apply
are PIN's 9357.08 through 9357.17. The modification requested by the
defendants is the removal of injunctive restraints on PIN's 9357.08 through
9357.17.

- 2 -

2. I am fully familiar with the facts and circumstances stated herein and make this affidavit upon personal knowledge and upon information and belief.

Estimates contained herein were compiled by the staff of the New York State Department of Transportation using sources and estimating techniques generally accepted by professional planners and engineers.

3. My background and experience have been heretofore presented to this Court in my previous affidavits sworn to September 24, 1973 and December 11, 1975. Briefly summarized: I have been Commissioner of Transportation of the State of New York since September 6, 1972. I have been with the New York State Department of Transportation and its predecessor organization (Department of Public Works) since 1957. Within the Department and its predecessor organization, I have held the additional positions of Assistant to the Chief Engineer, Program Coordinator, Director of the Office of Program Management, Assistant Deputy Superintendent, Assistant Executive Deputy Commissioner and Executive Deputy Commissioner.

4. The subject of the instant litigation is a Federal-aid Interstate highway project known as I-88. The highway, as conceived, is to be a four-lane, controlled access highway running from Binghamton in Broome County in a generally northeasterly direction to the Schenectady area. The total length, as conceived, would be approximately 125 miles.

5. As conceived, I-88 was to be constructed in a series of projects or PIN's. Approximately 27 such PIN's, each to be let under a separate contract, made up the route from Binghamton to Schenectady. As of November, 1973, the time of the issuance of this Court's preliminary injunction, those projects from Oneonta east did not have Federal commitment in the form of PS&E approval. These projects are PIN's 9357.03 through 9357.17 and PIN's 1357.01 through 1357.04.

Generally speaking, the former group of projects comprises the planned I-88 from Oneonta to the Schoharie/Schenectady County line. The latter group comprises the Schenectady terminus, a project of approximately 19 miles.

- 3 -

6. All those projects from Oneonta west to Binghamton, with the exception of the I-88/I-81 connector (PIN 9357.18), were either not subject to injunction or have previously been relieved by this Court from injunctive restraint.

Specific relief from restraint of the use of Federal funds was granted by this Court for the Oneonta Bypass (PIN's 9357.20 and 9357.19) on May 24, 1974, and for two projects in Broome County (PIN's 9357.00 and 9357.01) on January 28, 1976.

PIN's 9357.05 and 9357.07 were removed from injunctive restraints by corrective order of this Court on December 26, 1973.

7. Remaining under injunctive restraint against the granting of PS&E approval are the following segments of I-88:

(a) PIN 9357.18. This segment is commonly called the I-88/I-81 connector. It is designed to provide connection between the Port Crane segment of I-88, which was opened to traffic in 1969, with I-81. This short segment is the subject of its own intensive Environmental Impact Statement studying all local impacts.

(b) PIN's 9357.08 through 9357.17. These projects comprise I-88 from Oneonta to the Schoharie/Schenectady County line. They were the subject of one complete and Final Environmental Impact Statement and 4(f) statement which studied the impact of the entire segment in detail.

(c) PIN's 1357.01 through 1357.04. These projects comprise the Schenectady terminus and are the subject of a Supplemental Environmental Impact Statement, studying in detail all local impacts.

A Draft Environmental Impact Statement or Draft Supplemental Environmental Impact Statement has been prepared by this Department for each terminus (PIN 9357.18 and PIN's 1357.01 through 1357.04) and public hearings held. The Final Impact Statement for the I-81/I-88 connector is now in the last stages of preparation by the New York State Department of Transportation under the guidance and with the participation of the Federal Highway Administration. The Final Supplemental Environmental Impact Statement for the Schenectady terminus is in the final stages of processing by the Federal Highway Administration.

8. The relief requested in the motion, which this affidavit supports, is the removal of injunctive restraint on the granting of PS&E approval for PIN's 9357.08 through 9357.17. The basis of this request for relief from the restraint of the preliminary injunction is that: There now exists an accepted and approved Final Environmental/Section 4(f) Statement for Interstate 88, Oneonta to the Schoharie/Schenectady County line, Otsego and Schoharie Counties (PIN's 9357.08 through 9357.17) and a final approved Environmental Impact Statement for I-88 which contains a comprehensive statement of environmental considerations for the entire route, including the Binghamton terminus (I-88/I-81 connector) and the Schenectady terminus.

It is my firm opinion that every issue raised by the Court in granting preliminary relief has been obviated with respect to the projects for which relief is being requested at this time. The issues raised by the Court are discussed in detail hereafter.

9. This Court in its Memorandum-Decision and Order of November 14, 1973, raised four probable issues which the Court felt would require exploration at trial. The first of these general issues concerned the Environmental Impact Statement or statements for I-88.

(a) This Court questioned whether Environmental Impact Statements should have been filed where they were not.

A Final Environmental Impact Statement has been filed which considers in detail the impact of PIN's 9357.08 through 9357.17. The details of the processing of this statement are fully described in the affidavit of Frederick W. Memmott at Section 7 beginning on page 12 of the said affidavit sworn to August 17, 1972. A complete copy of the statement, entitled "Department of Transportation, Federal Highway Administration, prepared by New York State Department of Transportation, Final, Environmental/Section 4(f) Statement, Administrative Action for the Susquehanna Expressway, Interstate Route 88, Oneonta to the Schoharie/Schenectady County Line, Otsego and Schoharie Counties," is incorporated within the Memmott affidavit as exhibit 139. This statement as revised, was reviewed and received the approval by the Federal Highway Administration on August 8, 1972. The statement was properly filed with the Council on Environmental Quality according to the regulations in effect at the time.

A Final Environmental Impact Statement, which contains a comprehensive statement of environmental considerations for the entire I-88 route from terminus to terminus, has also been prepared, approved and accepted. This Impact Statement is entitled: "Final Environmental Impact Statement: Interstate Route 88 (The Susquehanna Expressway) Sanitaria Springs to the Broome/Chenango County line portion and the Oneonta Bypass portion with Comprehensive Statement of environmental considerations from Binghamton to the Capital District." A copy of the said statement was attached to and made a part of my affidavit of December 11, 1975. Since the execution of that affidavit, the statement received the approval and adoption of the Regional Federal Highway Administrator and has been properly filed with the Council on Environmental Quality.

(b) The Court raised as an issue the adequacy of filed statements.

At the time this question was raised, the latter statement mentioned in subsection (a) of this section had not been prepared or filed. The Court now has in its possession final approved impact statements evidencing extensive detailed analysis for PIN's 9357.08 through 9357.17 and a comprehensive overview for the entire route. Both of these statements have been extensively reviewed by the technical staffs of the New York State Department of Transportation and of the Federal Highway Administration for thoroughness and completeness of analysis. Both have been accepted and filed by the Council on Environmental Quality.

(c) The Court questioned whether the State or Federal agency was the appropriate agency for preparation of the impact statement.

Public Law 94-83 specifically overturned the ruling of the Second Circuit in Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F 2d 927 (2nd Cir. 1974). See the Second Circuit's Opinion of February 18, 1976 in the Vermont case, on remand from the Supreme Court, holding that a State agency may prepare an Environmental Impact Statement provided the Federal agency "furnishes guidance and participates in such preparation" and

provided "the responsible Federal official independently evaluates such statement prior to its approval and adoption." These criteria have been met with respect to both the specific impact statement for PIN's 9357.08 through 9357.17 and the comprehensive overview for the entire route.

The impact statement for PIN's 9357.08 through 9357.17 was prepared by the technical staff of the New York State Department of Transportation (NYSDOT) in accordance with the appropriate Federal rules and regulations in effect at the time. Numerous meetings were held with officials of the Division Office of the Federal Highway Administration (FHWA) during the preparation of the draft statement. In addition, several pre-draft copies of the draft statement were reviewed with further input provided by the Federal Highway Administration. The FHWA's extensive review of the Draft and Final Environmental Impact Statement is detailed in Section 7 beginning on page 12 of the affidavit of Frederick Memmott (referred to earlier).

The impact statement for I-88 containing the "Comprehensive Statement of Environmental Considerations from Binghamton to the Capital District" was prepared by the New York State Department of Transportation based upon the reports and studies of the Department's consultant. The consultant did submit the various portions of the Draft Environmental Impact Statement to NYSDOT and FHWA during the progress of his studies. These draft segments were reviewed and added to by NYSDOT and FHWA. This statement was prepared in accordance with the appropriate rules and regulations in effect at the time of preparation. A brief chronology of some of the participation of the Federal Highway Administration in the preparation of this statement is as follows:

February 20, 1974 - FHWA and NYSDOT jointly established the requirements and scope of services for the consultant.

FHWA approved the consultant agreement which became effective May 1, 1974.

May 7 & 8, 1974 - Complete field inspection of the entire I-88 corridor with meetings at both NYSDOT Region 9 in Binghamton and the Main Office of NYSDOT in Albany. FHWA personnel participated in both these meetings and in the field inspection.

June 12 & 14, 1974 - Progress meetings with consultant which were attended and participated in by both the FHWA Area Engineer and the FHWA District Engineer.

August 15, 1974 - Preliminary text of certain sections of proposed Draft Environmental Impact Statement transmitted to FHWA for review.

September 4 & 13, 1974 - Additional textual material forwarded to FHWA for review.

September 12, 1974 - Progress meeting attended by consultant and representatives of NYSDOT and FHWA.

October 17, 1974 - Meeting to review air quality segment of proposed Draft Environmental Impact Statement, attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA.

October 30, 1974 - Meeting between consultant, NYSDOT and FHWA to review progress on proposed Draft Environmental Impact Statement.

December 11, 1974 - Meeting on air quality segment of Environmental Impact Statement attended by various parties including representatives of the New York State Department of Environmental Conservation and of FHWA.

January 9, 1975 - Meeting on air and noise segment attended by consultant, subcontractor to consultant, NYSDOT and FHWA Area Engineer.

February 10, 1975 - Informal discussion of the Draft Environmental Impact Statement's progress between personnel of NYSDOT and FHWA.

March 7, 1975 - Air report meeting attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA.

March 25, 1975 - FHWA provided comments and guidance on the Draft Environmental Impact Statement.

April 14, 1975 - Meeting on air quality modeling attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA.

June 9, 1975 - NYSDOT transmitted copy of Draft Environmental Impact Statement to FHWA.

Throughout the preparation of this Draft and Final Impact Statement, there was verbal communication on a regular basis between NYSDOT and FHWA regarding the preparation, content and analysis of the statement.

The Final Environmental Impact Statement containing the "Comprehensive Statement of Environmental Considerations from Binghamton to the Capital District" has been independently evaluated and approved and adopted, after inclusion of additional noise impact material, by the Regional Federal Highway Administrator on February 13, 1976. The statement was filed with the Council on Environmental Quality February 18, 1976 and made available to the public by the Council on February 20, 1976.

(d) The Court also raised the issue of whether segmental submission procedure impeded the environmental analysis function under NEPA.

The comprehensive statement considers the impact of the entire route from terminus to terminus. This statement had not been prepared at the time of the issuance of the Court's preliminary injunction. I believe that this statement in and of itself is sufficient to render moot any argument that the route was merely considered on a segment-by-segment basis.

For any complete environmental study as mandated by NEPA, it is necessary to consider both the effect and consequences of the entire project as well as the localized effects of the individual segments of the project. Whether these considerations are reported under one cover or several covers has no relation to the effectiveness or completeness of the analysis.

The acquisition of right-of-way for, or even construction of, PIN's 9357.03 through 9357.17 does not make any commitment to actions which have not been subject to the entire NEPA process. The overall route has been subject to comprehensive environmental review. The review of the local impact of the Schenectady terminus has not as of yet been completed (although a design alternative has been recommended and a Final Supplemental Environmental Impact Statement for PIN's 1357.01 through 1357.04 should be accepted by FHWA and filed with the Council on Environmental Quality shortly). All possible Schenectady terminus alternatives remain viable even given the complete construction of I-88 to the Schoharie/Schenectady County line.

10. This Court in its Memorandum-Decision and Order of November 14, 1973 raised certain issues with regard to hearings. The Court felt that there was a question of whether hearings should have been held where they had not been and whether there were any promises or threats made with regard to the withdrawal of requests for public hearings.

23 United States Code 128 requires that hearings be held or the opportunity for hearings be afforded, in order to consider the economic and social effects of the location of a proposed highway and its impact on the environment, etc. In September, 1969, the public notice of opportunity for public corridor hearings was placed in three separate newspapers of general circulation in the area affected by PIN's 9357.03 through 9357.17.

Only one request for a corridor hearing was received for any proposed corridor segment between Oneonta and the Schoharie/Schenectady County line. This request was received from Mr. Oscar E. Hendrickson of Richmondville, New York. Mr. Hendrickson informed representatives of the NYSDOT Region 9 that he felt that insufficient consideration was being given to a possible corridor involving Brooker Hollow. After receipt of this information, the NYSDOT did give further consideration to Brooker Hollow as an alternative corridor and, in fact, included it on the list of considered corridors. Mr. Hendrickson was informed of these facts and withdrew his request for a corridor hearing. Absolutely no coercive activity was involved in the withdrawal of this request for hearing. The NYSDOT was merely being very responsive to public input.

- 10 -

Design hearings were held for each and every PIN for which relief is sought pursuant to the motion for which this affidavit provides support. A design hearing for PIN's 9357.08 through 9357.11 was held in August, 1973; a design hearing was held for PIN's 9357.12 through 9357.15 in November, 1973; a design hearing for PIN's 9357.16 and 9357.17 was held in February, 1976.

As of this time, all the hearing requirements of law and regulation for PIN's 9357.08 through 9357.17 have been complied with.

11. The Court in its Memorandum-Decision and Order of November 14, 1973 raised the issue of whether additional 4(f) statements needed to be prepared and whether those which had been prepared were adequate.

Within the proposed route defined by PIN's 9357.08 through 9357.17 there were three possible locations which might have required a 4(f) statement. These are:

(a) The proposed taking of approximately .14 acres from the Richmondville Recreation Area, Richmondville, New York. This proposed taking has been the subject of complete analysis as required by Section 4(f) [42 United States Code 1653(f), 23 United States Code 138]. Appendix E to the Final Environmental Impact Statement for PIN's 9357.08 through 9357.17 is the 4(f) determination and statement for this proposed taking. Section 7, beginning on page 12 of the aforementioned Menzotti affidavit, details complete information on the processing and filing of this 4(f) statement. The statement makes the required determinations that, there is no feasible and prudent alternative to the use of such land and that such program includes all possible planning to minimize harm to the recreational area. These determinations were made considering all sound and feasible engineering techniques. These determinations are substantiated by the necessary analysis.

(b) A second potential 4(f) situation exists in the area of Cobleskill Creek. The August 24, 1971 letter of Russell D. Fieldhouse, Regional Fisheries Manager, New York State Department of Environmental Conservation, establishes that New York State does not own any fishing easements on Cobleskill Creek. Since there are no publicly owned easements, no 4(f) statement is required relative to any acquisition affecting Cobleskill Creek.

- 11 -

(c) A third potential 4(f) situation concerns fishing easements owned by the State of New York under the jurisdiction of the Department of Environmental Conservation along Schenectady Creek. The highway alignment and design has been developed so that there will be no encroachment upon any publicly owned easement. In addition, the New York State Department of Transportation has closely worked with the New York State Department of Environmental Conservation relative to these easements. The proposed construction of I-88 will in no way adversely affect public access to these fishing easements. Therefore, no 4(f) statement is required relative to the Schenectady Creek.

12. The last potential issue raised by the Court relates to the navigability of the Susquehanna River.

On February 22, 1971, the United States Coast Guard verified by letter that the Susquehanna River in the State of New York was not classified as a navigable water. Such verification is referred to in the affidavit of Frederick Mammoth on page 30 and a copy of the letter was attached to that affidavit as exhibit 129. On June 13, 1973, the United States Coast Guard, Ninth District, again verified by letter that the Susquehanna River was navigable only to Mile 273.5, above Athens, Pennsylvania (this letter related to PIN's 9357.08 through 9357.11). Thus, at the time of commencement of the instant litigation, the question of the navigability of the Susquehanna River was settled under the law and regulations then in effect.

The proposed construction of I-88 from Oneonta to the Schoharie/Schenectady County line (PIN's 9357.08 through 9357.17) involves one planned bridge crossing of the Susquehanna River in PIN 9357.08.

Within approximately the last two years, both the Coast Guard and the Corps of Engineers have redefined their definition of "navigable waters" and have extended their control, by issuance of permit, to waters not previously covered. These changes have been instigated by Court action and brought about by change in the regulations of each agency.

Presently, the Coast Guard reviews the history of the watercourse to determine whether such waterway was ever used for navigational purposes. To the best of my knowledge, no Coast Guard redetermination has been made as to the navigability of the Susquehanna River within New York State under the more recent guidelines and regulations of the Coast Guard.

The Corps of Engineers also has certain permit jurisdiction over waters of the United States. A permit from the Corps of Engineers may now also be necessary for construction affecting the Susquehanna River.

At present, this Department does not have permits from the United States Coast Guard nor from the Corps of Engineers. However, these permits do not relate to permission to construct any of the PIN's nor to the validity of the Environmental Impact Statements for PIN's 9357.08 through 9357.17. They relate specifically to the structure spanning the designated watercourse or construction activity in the waterway.

Even more specifically, these permits are issued only after a review of the finalized design of the proposed structure relating to the watercourse. Therefore, in the normal course of progression of projects (under all those rules and regulations in effect in 1976), the applications for such permits, if they are determined to be necessary, could not be completed until Federal approval and adoption of the Final Environmental Impact Statement, Federal design approval and detailed design of the specific structure affecting the watercourse.

At the time of the issuance of this Court's injunction, November 14, 1973, the United States Coast Guard had determined the Susquehanna River in New York State to be non-navigable. If, in fact, that determination would be different under the rules and regulations in effect today, the progression of PIN 9357.08 has not yet reached the stage where permit issuance would be appropriate. If, in fact, the United States Coast Guard and/or the Corps of Engineers determines that specific permits are required for the structure relating to the Susquehanna River, all necessary permits will be applied for and obtained at the proper time. No work affecting the Susquehanna will be commenced without obtaining Coast Guard and Corps of Engineers permits if such are necessary. Therefore, any issue relative to the navigability of the Susquehanna River is not "ripe" for Court consideration at this time.

13. All issues raised by the Court in its Memorandum-Decision and Order of November 14, 1973, have been completely obviated or are not proper grounds for sustaining the present preliminary injunction. All PIN's for which relief is requested are in complete compliance with NEPA.

14. Relief from all injunctive restraints for PIN's 9357.03 through 9357.17 is necessary at this time for the following reasons:

(a) The Federal Highway Administration, in keeping with the spirit of this Court's injunction, but not the letter, has refused to participate with Federal funds in advanced right-of-way acquisition and right-of-way acquisition for these projects. The acquisition of right-of-way for Federal-aid projects is generally accomplished at this point in the progression of these PIN's.

The acquisition of right-of-way and the relocation of residences and businesses is a time-consuming process. All delay in such right-of-way acquisition for each PIN delays final detailed design, contract letting and ultimate completion of the project. The Federally-aided acquisition of right-of-way is the immediate need of the New York State Department of Transportation for these PIN's. Completed right-of-way acquisition and relocation of all residences and businesses is a prerequisite to any type of construction activity. This stage alone may take more than two years (under the negotiation, acquisition and relocation requirements of New York State and Federal law, rules and regulations).

(b) The existence of injunctive restraints greatly inhibits proper financial planning and commitment of funds for the specified PIN's both at the State and Federal levels. When the proper administrative agencies (NYSDOT and FHWA) have control over the planning and progression of major projects such as these, funds are available and can be allocated in an orderly manner. The injunction on these PIN's, to a great extent, eliminates NYSDOT's ability to plan and schedule all progression of these I-88 projects.

(c) In my affidavit, sworn to December 11, 1975, I detailed some of the consequences of delay in construction of two I-88 projects in Broome County. Those same factors apply to these projects.

A completed four-lane, controlled access highway drastically reduces traffic accidents. Travel time and fuel consumption is decreased. There is an inflation rate of approximately 9% per year

in the highway construction industry. Delay in getting these projects under contract is literally costing the taxpayers of this State millions of dollars. Lastly, the flow of future Federal funds depends upon projects in progress within the State. Delay in progression of these projects may seriously and adversely affect the flow of Federal funds into New York State in future years.

15. The motion, for which this affidavit provides support, is the third time this Court has been requested by the defendants for relief from injunctive restraints for specific projects. The New York State Department of Transportation has requested piecemeal relief.

If time limitations and monetary constraints permitted, the NYSDOT would have much preferred to have taken action to obviate and make moot every possible issue raised by this Court with respect to the entire route, and only at that time moved for complete relief for the entire I-88 route.

However, I-88 has not and cannot be progressed as one route in an orderly manner. As this Court knows, the entire route was in various stages of progression at the time of the imposition of injunctive restraints. As a public administrator, I cannot ignore work which had been accomplished to that date. Some projects were completed and open to traffic. Some projects were well advanced in the construction stage. Others were less well advanced, but when completed would connect those already open to traffic. Others were well along in the planning stages and had had complete local environmental studies performed. The I-88/I-81 connector presents special local problems. The Schenectady terminus presents special local problems. Because of these various states of progression, separate segments were qualified for relief from injunctive restraints, by actions of NYSDOT and FHWA, at separate times.

In addition, the total investment to date in the I-88 route is over \$111,000,000. With design and construction costs for each PIN running into the millions of dollars, it is simply imperative that relief for each PIN be obtained at the earliest possible time.

16. Although the New York State Department of Transportation has and is now again asking for specific relief for specific PIN's, we have never on previous occasions, nor on this occasion, requested relief until

the Department was firmly convinced that such relief was merited and justified under the terms of this Court's Memorandum-Decision and Order of November 14, 1973.

17. I expect that within the next few months a Final Supplemental Environmental Impact Statement and a Final Environmental Impact Statement will be filed with the Council on Environmental Quality for the Schenectady terminus and the I-88/I-81 connector, respectively. These statements will analyze in detail all local impact of these termini and, in conjunction with the comprehensive statement for the entire I-88 route, will afford complete compliance with NEPA.

When these statements reach this stage, we intend to again move this Court for relief for these projects.

WHEREFORE, your deponent respectfully requests that this Court's Memorandum-Decision and Order, dated November 14, 1973, be amended so as to remove all injunctive restraint against the granting of PS&E approval for those PIN's known as: PIN's 9357.08 through 9357.17.

/s/ Raymond T. Schuler
RAYMOND T. SCHULER

Sworn to before me this
12th day of April 1976

/s/ William S. MacTiernan
Notary Public

WILLIAM S. MACTIERNAN
Notary Public, State of New York
Qualified in Schenectady Co
My Commission Expires 12/31/78

UNITED STATES GOVERNMENT

*Memorandum*U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

RECEIVED

DEC 3 1972

DATE: December 1, 1972
ALBANY OFFICE

In reply refer to: 01-30.4C

TO : Director, Planning Division
N.Y.S. Department of Transportation
Albany, New York

FROM : John G. Bestgen
Division Engineer
Albany, New York

SUBJECT: Request for Location Approval - I-88
Oneonta (C.R. 47) to the Schoharie-Schenectady
County Line; Otsego and Schoharie Counties
PIN 9357.08-.17

This is in response to your request submitted in your letter of June 30, 1971 and November 9, 1972 for location approval for the portion of the Susquehanna Expressway, I-88, from C.R. 47, Oneonta to the Schoharie-Schenectady County line. In accordance with your request, location approval is given to alternative "A-2" for the segment from C.R. 47 East of Oneonta to Richmondville, and to alternative "B-2" for the segment from Richmondville to the Schoharie-Schenectady County line. You are now in a position to proceed with the design preparatory to the design recommendation.

J. G. Bestgen
For the Division Engineer



BUY U.S. SAVINGS BONDS REGULARLY ON THE PAYROLL SAVINGS PLAN

A 342

Memmott/Smith

mb & file

DEC 15 1972

Ewe

December 6, 1972

Director, Planning Division
N.Y.S. Department of Transportation
Albany, New York

01-30.4C

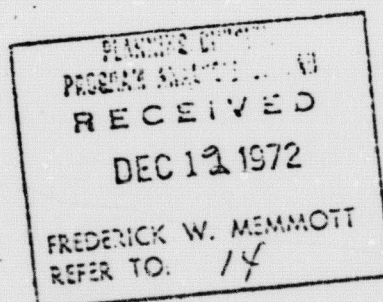
John G. Bestgen
Division Engineer
Albany, New York

PIN 9357.08-.17, Susquehanna Expressway
Oneonta to Schenectady County Line - Including the
Reconstruction of Route 10 in Richmondville
Otsego and Schoharie Counties
Location Approval

Our location approval letter of December 1, 1972 did not mention
that section of Route 10 to be reconstructed as portion of the
I-88 project in Richmondville.

As the Project Information Reports, the Environmental Impact
Statement, and your request for location approval included this
portion of Route 10, our location approval letter of December 1
also granted location approval for Route 10 (Richmondville-Summit)
which is presently part of PIN 9357.12.

JOHN G. BESTGEN



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DEC 7 1972

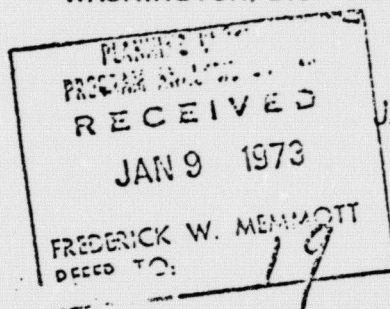
OFFICE OF DIRECTOR
PLANNING DIVISION
Ref. No. 14



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 10 1973

E3039
ER 72/1264



JAN 5 1973

Dear Mr. Memmott:

We have reviewed the final combined environmental/Section 4(f) statement for I-88 (Susquehanna Expressway), Otsego and Schoharie Counties, New York.

It appears, from reviewing the final statement, that the concerns and objections raised previously by the Department have been adequately resolved.

Therefore, contingent on implementation of measures to minimize harm, including continued coordination with the Department of Environmental Conservation during design studies and planning, we have no objection to Section 4(f) approval for the taking of 0.14 acres from the 3-acre Richmondville Recreational Area.

Sincerely yours,

Deputy Assistant Secretary of the Interior

Mr. F. W. Memmott
Director, Program Analysis Bureau
New York Department of Transportation
1220 Washington Avenue, State Campus
Albany, New York 12226

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
ET AL.,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 72-CV-254

JOHN A. VOLPE, Secretary of
Transportation of the United
States, et al.,

Defendants.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JAMES E. CULLUM, being duly sworn, deposes and
says:

1. That he is an Assistant United States Attorney
for the Northern District of New York and knows the contents
of the file in this office as the same pertains to the
above.
2. That this Affidavit is submitted in response
to a motion by the State defendant for a modification of
the Memorandum Decision and Order of this Court, dated
November 14, 1973, which granted a preliminary injunction
herein and that said modification referred to pertains to
Projects 9357.08 through 9357.17.
3. That the aforesaid motion is returnable on
May 10, 1976.
4. Upon information and belief that the public
interest will be best served by granting the relief sought
by the State defendant in the present motion.
5. That the Federal defendants do not object to
the granting of the relief sought herein.

-2-

WHEREFORE, the Federal defendants respectfully request that the Court amend and modify its Memorandum Decision and Order dated November 14, 1973, to permit Federal funds to participate in the completion of PINS9357.08 through 9357.17.

James E. Cullum
JAMES E. CULLUM

Sworn to before me this
6th day of May, 1976.

Judith A. Panko
NOTARY PUBLIC

JUDITH A. PANKO
Notary Public, State of New York
Qualified in Albany County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x

CAPITAL REGION CITIZENS COMMITTEE, et al.,	:	Civil Action
	:	File No.
Plaintiffs,	:	72-CV-254
-against-	:	
JOHN A. VOLPE, Secretary of Transportation	:	<u>AFFIDAVIT</u>
of the United States, et al.,	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WILLIAM HOPPEN, being duly sworn, deposes and says:

That he is attorney for The Richmondville Property Owners Committee and New York State Coalition for Safe Transportation. This affidavit is made in opposition to the motion of defendants Commissioner of Transportation of the State of New York, et al., for a modification of the Memorandum-Decision and Order dated November 14, 1973 with regard to PINs 9357.08 to 9357.17 in Otsego and Schoharie Counties. A review of the status of the litigation with regard to these segments, and of the project as a whole will establish the basis of the position that there has not been compliance with Federal law and that further construction, if any, should proceed with State funds.

Extensive reference will not be made to the papers heretofore filed herein, but the complaint, the affidavits and other papers submitted to the Court in opposition to the motions for summary judgment, in support of the motion for preliminary

injunction, and subsequent to the Memorandum-Decision and Order dated November 14, 1973, as well as said Memorandum-Decision and Order, are incorporated by reference in opposition to the instant motion, in support of the position that relief should be denied at this time.

In addition, the further evidentiary material with regard of the failure of defendants to have complied with Federal law as set forth upon the Broome County motion by Mr. Kabin, and upon this motion, is likewise incorporated.

In affiant's opinion, the application herein made is distinguishable from the application heretofore made with reference to the Oneonta segments (PINs 9367.19 and 9357.20) by reason of the particular circumstances of the Oneonta construction, as set forth in the papers therein and in the Court's Memorandum-Decision and Order of May 24, 1974. The plaintiffs, upon the prior application, did not oppose the relief therein requested, but did so upon explicit reservations, as noted in the Memorandum, that any action taken by the Court in connection with permitting construction of the Oneonta By-Pass not be considered in any way to weaken or otherwise diminish the strength of the plaintiffs' overall position vis-a-vis the Susquehanna Expressway (I-88) itself. In brief, plaintiffs contended, both with respect to the subject Oneonta By-Pass and the Susquehanna Expressway itself that the defendants had failed to comply with the National Environmental Policy Act, both procedurally and substantively, and as related to the Federal Clean Air Amendments of 1970; with Section 4(f) of the Department of Transportation Act of 1966 and related provisions of law pertaining to protection of public parklands and recreation areas; with Federal laws and regulations requiring public hearings and those protecting

the Susquehanna River as a navigable waterway; and had improperly, for purposes of funding, included the subject project in the Interstate Highway System.

In connection with the funding point, and the adverse impact upon its Federal status of the apparent failure of the State and Federal defendants to have complied with Federal law in its planning and approval, the attention of the Court was, again, respectfully called to the Affidavit of Commissioner Schuler, dated September 24, 1973, theretofore submitted to the Court in conjunction with the preliminary injunction motion. In that affidavit, Mr. Schuler, speaking in his official capacity as Commissioner of Transportation of the State of New York, advised the Court, with reference to the subject project that, while it was recognized that Federal funds might be delayed or, perhaps, withdrawn altogether in the event of an adverse conclusion to the litigation, the project itself was important enough to the State of New York to be completed, though perhaps in some revised form or schedule, even without Federal aid. In particular, and insofar as here applicable, Commissioner Schuler stated (Schuler Affidavit, Sept. 24, 1973, pp. 5-6):

"Lastly, it is to be noted that the project presently designated I-88 between Binghamton and Schenectady was included as a priority project in the State's 1969 Master Plan, prior to receiving the Interstate designation. In the 1972 Master Plan, it has similarly been identified as a planned major intercity freeway. (See Exhibit (8), pages 40-41, 68-69 and Exhibit (107), pages 31-34, submitted on State defendants' motion for summary judgment). The decision to include this expressway in the State's Master Plan was based upon numerous economic and other factors unrelated to the avail-

(Affidavit of Commissioner Raymond T. Schuler, New York State Department of Transportation, September 24, 1973, cont.)

ability of Federal funds. While it is recognized that such funds might be delayed or, perhaps, withdrawn altogether in the event of an adverse conclusion to this litigation, the project itself is important enough to the State of New York to be completed, though perhaps in some revised form and schedule, even without Federal aid."

* * *

This representation was noted by the Court, in its Memorandum-Decision and Order of November 14, 1973 (Note 80, p. 40), in the following terms:

"State Commissioner of Transportation Schuler has advised the court, by affidavit of Sept. 24, 1973, that the State of New York can and will, if necessary, build I-88 without Federal funds. See Schuler Affidavit, page 6."

* * *

This was, again, referred to in the Memorandum-Decision and Order of May 24, 1974, with regard to the Oneonta By-Pass, in regard to the fashioning of the restraint with respect thereto (pp. 2-3), in terms of reference to "the representation by the State defendants * * * that the project would be completed, if necessary, without federal funds."

This representation by the State, made to the Court at the time of its consideration of the scope of relief to be granted upon plaintiffs' motion for a preliminary injunction, has likewise been a factor in plaintiffs' assessment of subsequent relief asked, particularly with reference to the Oneonta By-Pass; and, indeed, of the construction of those segments to

the west of Oneonta on which work has been permitted to proceed. If, as the Commissioner has represented to the Court on behalf of the State, the highway will be built as a State project in the event it is eventually determined that there has not been compliance with Federal law, the matter at that point simply becomes a bookkeeping problem between the State and Federal governments; and the highway now under construction between Oneonta and Binghamton will simply become another part of the State highway system, an improved limited access four-lane highway between those cities.

At that point, too, the improvement of Route 7 in the rest of the corridor (to the east of Oneonta), whether by a new highway or improvement of the existing highway, will necessarily be undertaken by the State, as Commissioner Schuler has stated, to be completed in such revised form and schedule as the State may determine, taking into account all of the State's transportation needs and weighing them against the traffic needs of this particular area.

It would appear, indeed, that the Commissioner is sensitive to the expenditure of State funds alone for the project, at the current posture of the litigation. In his subsequent affidavit of May 1, 1974, para. "4", submitted in connection with the motion respecting the Oneonta By-Pass, he further stated that it was his judgment that State funds had been appropriated by the Legislature upon a presumption that "ninety percent thereof would be reimbursed, and that these funds should not be used if reimbursement were uncertain." The uncertainty, indeed, is implicit in the lawsuit, and in the issues raised as adverted to by the Court in its Memorandum-Decision and Order of November 14, 1973; it is quite clear from the foregoing that the State is proceeding

at its own risk in expending further funds on the Susquehanna Expressway in the expectation of eventual Federal funding, a matter which has heretofore been called to the State's attention, both by the initiation of litigation in May of 1972, and by subsequent advice.

In short, and purely at a State level as distinguished from the issues of the instant litigation, it would appear that continued current expenditure of funds for construction in the corridor, notwithstanding the serious legal questions involved, and further in absence of specific New York State legislative authorization for expenditure of funds therefor as a State project alone, is open to serious fiscal and legal objections as involving, in fact, illegal expenditure of public funds. This, however, is of no direct concern in the instant litigation since it involves the responsibility of State officials to State courts and to the Legislature itself, and is not a matter, it would appear, of which Federal courts are required to take judicial cognizance. This is, however, adverted to by way of reference to the State's ambiguous posture in the corridor, and to anticipate and forestall, upon the conclusion of the litigation adversely to the State, any possible claim by the State of an equitable nature based upon good faith reliance upon Federal funding procedures and FHWA administrative requirements. Certainly as of the time of initiation of litigation, if not before, the State was on notice that both the Federal procedures as well as the substance of its own compliance with them were in serious legal question, and that it was proceeding at its own risk in undertaking further construction and in expending State funds therefor.

For the foregoing reasons it is respectfully urged that the motion of the State defendants to modify the Memorandum-Deci-

A 352

sion and Order of November 14, 1973 should be denied without prejudice to their proceeding to construction under the terms of said Memorandum-Decision and Order.

WILLIAM HOPPEN

William Hoppen

Sworn to before me this

7th day of June, 1976.

LEON R. JILLSON, JR.

LEON R. JILLSON, JR.
Notary Public, State of New York
No. 31-19711340
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X

CAPITAL REGION CITIZENS COMMITTEE, et al.,	:	Civil Action
	:	File No.
Plaintiffs,	:	72-CV-254
-against-	:	
JOHN A. VOLPE, Secretary of Transportation	:	<u>AFFIDAVIT -</u>
of the United States, et al.,	:	NATIONAL
	:	ENVIRONMENTAL
Defendants.	:	POLICY ACT
	:	OF 1969

-----X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WILLIAM HOPPEN, being duly sworn, deposes and says:

That he is attorney for The Richmondville Property Owners Committee and New York State Coalition for Safe Transportation, and submits this affidavit with reference to the application of the National Environmental Policy Act of 1969 to the procedures herein followed by the defendants, and the failure of defendants to have complied therewith.

Affiant has already reviewed, in his affidavit of October 24, 1972, a number of the substantive deficiencies of the impact statements. See, also, Affidavit of Racko, Oct. 17, 1972; and Exhibits attached to the foregoing. It should be emphasized, since that time, there has been little if any substantive change in the reports then made, except as hereinafter noted. The State, essentially, is standing pat on the statements already made, with the addition of a so-called "comprehensive overview" or summary of the original segmented statements, apparently prepared by a consul-

ant.

The status of the defendants' compliance with the National Environmental Policy Act of 1969, as of the time of the Memorandum-Decision and Order of November 14, 1973, was as set forth at pages 15-16, 21-22. As of that time, four segments had received PS&E approval and were under construction although no environmental impact statements had been filed (PINs 9357.00, 9357.01, 9357.20, 9357.19).

Public Law 94-83

By Public Law 94-83, effective August 9, 1975, a new subparagraph "(D)" was added to Section 102(2) of the National Environmental Policy Act in order to clarify procedures with respect to the preparation of environmental impact statements, as follows (42 U.S.C. 4332):

"(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official, if:

"(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

"(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption * * *

* * *

"The procedures in this subparagraph shall not relieve

(Public Law 94-83, cont.)

the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act * * * ."

Former subparagraphs starting with "(D)" were relettered as "(E)", "(F)", "(G)", "(H)", and "(I)", respectively. In reaffirming the responsibility of the Federal official for compliance with the Act, Congress in the Committee Reports accompanying H.R. 3130, which eventually became Public Law 94-83, emphasized this aspect of continuing Federal responsibility, and in the House Report (No. 94-144, 94th Cong., 1st Sess., p. 6) specifically confirmed the authority of the Greene County case in the following terms:

"The Conservation Society opinion is a successor to an earlier opinion of the Court of Appeals for the Second Circuit in Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2d. Cir., 1972), Cert. Denied, 409 U.S. 849 (1973). The Greene County decision is the first and leading opinion on the 'delegation' question. The reasoning of that opinion and the basic holding in the case have never been rejected by a court, nor should H.R. 3130 be interpreted as disturbing the basic logic of that case."

* * *

On the basis of the foregoing, and of the record in this case, it is respectfully urged that defendants have failed to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C., Section 4321, et seq., with regard to bringing the authority and procedures of the United States Department of Transportation into conformity with the intent, purposes, and procedures of said Act, or with the par-

particular requirements of Public Law 94-83, 42 U.S.C., Sec. 4332(D), effective August 9, 1975, in that it was not prepared by a State agency or official having statewide jurisdiction and having the responsibility for such action within the meaning and intentment of the Act; the responsible Federal official did not furnish guidance and participate in such preparation as required by the statute; the responsible Federal official did not independently evaluate such statement or statements prior to their approval and adoption, but approved them in a routine manner not consistent with statutory requirements of Federal responsibility therefor; and the responsible Federal official failed to carry out his statutory responsibilities for the scope, objectivity, and content of the various statements, and of his other responsibilities under the National Environmental Policy Act.

WILLIAM HOPPEN

William Hoppen

Sworn to before me this

8th day of June, 1976.

LEON R. JILLSON, JR.

Notary Public

LEON R. JILLSON, JR.

Notary Public, State of New York

No. 31-19711340

Qualified in New York County

Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X

CAPITAL REGION CITIZENS COMMITTEE, et al.,	:	Civil Action
Plaintiffs,	:	File No.
-against-	:	72-CV-254
JOHN A. VOLPE, Secretary of Transportation	:	AFFIDAVIT
of the United States, et al.,	:	
Defendants.	:	

-----X

STATE OF NEW YORK }
COUNTY OF NEW YORK } S3.:

WILLIAM HOPPEN, being duly sworn, deposes and says:

That he is attorney for the Richmondville Property Owners Committee and New York State Coalition for Safe Transportation, and makes this affidavit in answer to the affidavits of Douglas S. Dales, Jr., dated April 16, 1976, and Raymond T. Schuler, dated April 12, 1976, upon the current motion to modify the preliminary injunction.

It is the position of the plaintiffs whom affiant represents that the defendants have failed to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C., Section 4321, et seq., with regard to bringing the authority and procedures of the United States Department of Transportation into conformity with the intent, purposes, and procedures of said Act; and, further, with the particular requirements of Public Law 94-83, 42 U.S.C., Sec. 4332(D), effective August 9, 1975, in that compliance therewith has not been by a State agency or official having statewide jurisdiction and having the responsibility for such action within the meaning and intent of the Act; that the responsible Federal official did not furnish guidance and participate in

such preparation as required by the statute; that the responsible Federal official did not independently evaluate such statement or statements prior to their approval and adoption, but approved them in a routine manner not consistent with statutory requirements of Federal responsibility therefor; and that the responsible Federal official failed to carry out his statutory responsibilities for the scope, objectivity, and content of the various statements, and of his other responsibilities under the National Environmental Policy Act.

It is further the position of said plaintiffs, apart from the failure to have complied with the Act as aforesaid, that the project sponsor, the New York State Department of Transportation has failed adequately to have reported with regard to the Project's impact on air pollution, noise pollution, and on other protected environmental areas, or in terms of alternatives to the proposed action. Basically, this relates to the substantive deficiencies of the various segmented statements as reviewed in the materials already before the Court on the motions for summary judgment and injunction, as well as the additional materials herewith submitted.

Affiant has already reviewed, in his affidavit of October 24, 1972, a number of the substantive deficiencies of the impact statements. See, also, Affidavit of Reeko, Oct. 17, 1972; and Exhibits attached to the foregoing. It should be emphasized, since that time, there has been little if any substantive change in the reports then made, except as hereinafter and otherwise noted. The State, essentially, is standing pat on the statements already made, with the addition of a so-called "comprehensive overview" of the original segmented statements, apparently prepared by a consultant.

The question of segmentation, of course, is broader than the mode of reporting, and the question of how the report is bound (cf. Schuler Affidavit, Apr. 12, 1976, p. 3), but goes to the heart

of the purpose of the National Environmental Policy Act and the good faith of the reporting process itself as related to the purpose of the statute. There has never, in this case, been such a comprehensive overview and report on the basic postulates that led to the construction decision, on an inter-modal basis. Rather, as heretofore noted, the segmented procedure employed in reporting, and now continued with the remaining segments and the so-called "comprehensive overview" or summary of the segments, has been employed, through diversionary attention to detail, to avoid just such a comprehensive overview in the sense required by the statute, and to mask a predetermination to build made in the prior decade primarily on fiscal grounds (i.e., availability of Federal funding) that thrusts through the impact reporting process and contrary requirements of law as mere impediments to the original determination.

Such being the case, it is clear that the objection to segmentation of environmental reporting, to the extent herein practiced by the project sponsor, and as noted by the Court, continues to be a frustration of the comprehensive planning function, and is inconsistent with the purpose of the Greene County decision and the National Environmental Policy Act.

It is further plaintiffs' position that the Susquehanna River is navigable, that defendants have failed to comply with the terms of Section 4(f) of the Department of Transportation Act, 49 U.S.C., Section 1653(f), as amended, and Section 133 of the Federal-Aid Highway Act of 1963, 23 U.S.C., Section 133, in connection with the preservation of the natural beauty of the countryside and of protection of public park and recreation lands, and that defendants have failed to comply with 23 U.S.C., Section 129, with regard to the holding of public hearings. These issues, too, as well as plaintiffs' initial claim that defendants have illegally approved the inclusion of the subject project as part of the National System for Interstate and Defense Highways, for purposes of funding,

in violation of law, remain for determination under the terms of the Memorandum-Decision and Order of November 14, 1973, and within the Complaint. The factual issues raised by the Affidavit of Schuler, Apr. 12, 1976, pp. 4-12, are appropriate to be tried, subject to the completion by the State of environmental statements with regard to other segments of the highway as set forth at page 15 of his Affidavit, in accordance with the terms of the said Memorandum-Decision and Order, pp. 19-20; and it would appear, under the circumstances, that the current motion to modify said Order only with reference to EIRs 9357.03 through 9357.17 is premature.

This is particularly true since Commissioner Schuler, in his Affidavit (Apr. 12, 1976, p. 15) has indicated his intention to complete these final steps with regard to reporting on the other segments within the next few months; and, further, that he intends at such time or times as they are completed further to move this Court, on a separate basis, for relief similar to that now being requested with regard to the particular segments here at issue. In view of the imminence of completion of the State's work with regard to these other segments, it would appear to be appropriate that such separate motion or motions as they may entail be brought before the Court at the same time, rather than piecemeal, and that there be final resolution of all issues with regard to the project at one time, in accordance with the Memorandum-Decision and Order aforesaid.

Energy Reporting

Materials with reference to the energy implications of the proposed action are already before the Court in affiant's affidavit of October 25, 1973 (Affid. of W. Hoppen, pp. 2-9; EIRs. "1" and "2"); these will not be repeated, but are incorporated by reference. It is plaintiffs' further position that defendants have failed to comply with the requirements of the National En-

Environmental Policy Act with regard to the required consideration of alternatives to the proposed action particularly insofar as they relate to the energy implications of the proposed action. Attached as an Exhibit is material prepared by Michael Gerrard with particular reference to the reporting on hidden energy demands and its implications in terms of modal choice, written with particular reference to the West Side Highway in Manhattan, another project of the New York State Department of Transportation which is under review. Gerrard, Michael, "Disclosure of Hidden Energy Demands: A New Challenge for NEPA", Environmental Affairs (The Boston College Environmental Law Center), Vol. IV, No. 4, Fall 1975.

William Hogen
 William Hogen

Sworn to before me this

11th day of June, 1976.

Leon R. Jilison Jr.
 Notary Public

LEON R. JILISON JR.
 Notary Public, State of New York
 No. 31-1971110
 Qualified in New York County
 Commission Expires March 30, 1

Environmental Affairs

DISCLOSURE OF HIDDEN ENERGY DEMANDS: A NEW CHALLENGE FOR NEPA

*By Michael Gerrard**

INTRODUCTION

The specialization of the American economy obscures the identity of the ultimate users of energy, even from themselves. As a result consumers remain ignorant of the amount of energy which they use, and of the efficiency of that usage.¹ Direct personal use of energy in the United States, such as electricity and natural gas for home heating, cooking and lighting, and gasoline for private automobiles, accounts for only about one-third of national energy use.² Usage by industry and government to provide for the intermediate and final goods and services, for which we as individuals ultimately pay through our purchases and taxes, accounts for the remainder. To all but the most sophisticated consumers, this two-thirds portion of our actual energy demand is nearly invisible.

To illustrate the hidden dimension of energy use, take the simple example of this page. It appears to be inert, consuming no energy except for the light required to read the print. But the manufacture of this page involved various energy-consuming steps. First a tree had to be cut down by a mechanical saw, conveyed by land or water to a paper mill, and reduced to pulp by mechanical de-barkers, chippers and cookers. Once chemically or mechanically converted into paper, the sheet may have been transported to another city where ink was applied by an electrically-driven printing press and the pages were bound. The completed journal was then transported to its subscribers. To these energy expenditures must be added a share of the energy consumed in the manufacture of the saws, paper mills and trucks which would not have been built had there not been sufficient demand for reading material, plus a share of the energy required to mine the coal or extract the oil that ran the machines that produced the saws and the other devices, and so on. The com-

pounding of these and other remote effects shows that our seemingly innocent sheet of paper in fact has ultimately consumed an indeterminate but non-trivial amount of energy. Society is suffused with these hidden effects,² whose sum has been enough not only to cause economic turmoil¹ (through the unanticipated effects of fuel price hikes), but also to threaten environmental disaster, since roughly 80% of all air pollution, plus lesser amounts of other forms of pollution, is directly attributable to the use of energy by motor vehicles, boilers, furnaces, and electric power plants.³

The indirect use of energy largely accounts for one of the most alarming—if least noticed—energy events of the past decade. Since the 1920's, the productivity of energy had been increasing⁴ as a result of more efficient technologies and the increasing importance of the low-energy service sector of the economy. In 1966, however, this trend suddenly reversed, and until 1970 energy use became dramatically less efficient. Since 1970, the trend has improved somewhat. The post-1966 reversal is mainly attributable to the use of fuels for non-energy purposes such as raw materials for synthetic products like fertilizer, detergents and plastics, and to the use of less efficient forms of energy, especially electricity.⁷ Changes in production and consumption patterns, such as the use of modern energy-consuming luxuries, *e.g.*, air conditioning, and the absence of improvements in power plant efficiency, have exacerbated this effect.⁸

Increased industrial energy consumption since World War II has also been due partly to the substitution of power for labor. In a time of scarce energy and high unemployment, it makes sense to try to reverse this process and partially to de-automate, particularly if energy costs continue to rise faster than labor costs. Should such a reversal take place, craftsmanship and durability might be valued more, and high labor productivity less, especially if declining productivity signifies a shift to a lower-energy economy.

Considerations of indirect energy have unfortunately been bypassed by the main stream of environmental policy-making. Systematic energy accounting is a pre-requisite to achieving the oft-advocated low-consumption society. New techniques have been devised to calculate the use of indirect energy, but they have not yet found widespread application. Their use could have profound effects on a wide range of industrial and governmental practices. Simple dollar cost accounting does not always reflect differences in the energy cost of comparable products or undertakings. The different prices of different fuels, and of the same fuels in different regions and from different sources; government subsidies and price controls;

and other hidden factors mean, for instance, that two different buildings or building materials with the same selling price may have far different energy impacts in construction and operation. Furthermore, in projects where expense is not normally a major consideration, such as certain medical or national defense items, energy may still be conserved while preserving the goals of the projects.

The impact statement process of the National Environmental Policy Act of 1969 (NEPA),⁸ probably the nation's most powerful single tool for environmental protection, is a logical place to institutionalize the use of indirect energy analysis. This article seeks to show why such calculations are important, how they may be performed, what their implications are, and how they may be applied to NEPA. The article will begin with a discussion of the current lack of and need for energy analysis in environmental impact statements. Next is an explanation of new techniques which have been developed to analyze energy impact, followed by a detailed examination of how these techniques were applied to one major construction project (a proposed New York City highway). Finally some implications of such analysis to public policy will be shown.

I. INDIRECT ENERGY AND NEPA

Although an average of 1270 environmental impact statements (EIS's) have been filed annually under NEPA for the past three years,⁹ energy has been largely ignored. The Nixon administration considered exempting from NEPA projects which promised to increase energy supply¹⁰ for fear that the impact statement process would cause delays and exacerbate energy shortages,¹¹ but apparently few realized that NEPA could *save* energy. Thus the government was left with very little control over the 40% of American energy which is consumed by manufacturing,¹² even though the government itself is a major purchaser of the products of that industrial energy.

This failure occurred in spite of the rather clear statutory language in NEPA that environmental impact statements should describe the impact of the proposed action on "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."¹³ The Council on Environmental Quality (CEQ) guidelines for preparation of impact statements are even clearer. They specify that "secondary or indirect, as well as primary or direct, consequences for the

environment should be included in the analysis Such secondary effects . . . may often be even more substantial than the primary effects of the original action itself."¹⁴ The same guidelines also mention "energy and natural resources conservation"¹⁵ as areas of environmental impact.¹⁶

Furthermore, many NEPA commentators have advocated that close attention be paid to these secondary impacts.¹⁷ The courts have on several occasions ruled impact statements inadequate because of failure to analyze such secondary impacts as energy consumption,¹⁸ stream sedimentation,¹⁹ and irretrievably lost capital resources.²⁰ But by all accounts these secondary effects, especially those relating to long-term productivity, have been largely ignored in the impact statement process.²¹ CEQ found in a poll of all federal agencies in November, 1974, that "in general, the problem [of energy impact] has been recognized but that little has been done to develop good methods or guidelines to assess energy demands."²² Among the plethora of handbooks which has been released on preparing impact statements, there is only glancing mention of energy impact.²³ Even the Federal Energy Administration (FEA), did not mention indirect energy in its proposed guidelines for impact statements on FEA projects,²⁴ and the General Services Administration (GSA), which constructs government buildings and hence is responsible for a great deal of energy use, did not even mention direct energy in its proposed EIS guidelines.²⁵ The Environmental Protection Agency (EPA) has not rejected statements which did not analyze energy impact.²⁶

CEQ reports that 21 states have adopted some sort of NEPA-type impact statement requirement,²⁷ most requiring the same types of impacts to be analyzed as NEPA itself does.²⁸ As Table 1 shows, eight of the 21 states require in their laws or administrative rules that some aspects of the *direct* energy requirements of proposed projects be analyzed, but none explicitly calls for analysis of *indirect* energy impact. A number of the states report that new requirements are being formulated, and so it is possible that some states will soon mandate such indirect energy analysis.²⁹

One possible indication that the federal and state governments might be responsive to the need for indirect energy analysis is EPA's willingness (albeit under court pressure)³⁰ to promulgate indirect source regulations³¹ under the Clean Air Act,³² by which such traffic-generating facilities as shopping centers can be banned because of their likely contribution to automobile pollution. Several of the state "little NEPA's" also require such analysis of the indirect im-

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pact of new facilities on community growth.

For indirect energy analysis to be useful in evaluating environmental impact, uniform techniques must be adopted to perform the necessary calculations. Progress is rapidly being made in devising such techniques.

TABLE 1

STATES WITH ENVIRONMENTAL IMPACT STATEMENT REQUIREMENTS

<u>State</u>	<u>Authority</u>	<u>Energy Requirements</u>
Arizona	Administrative memoranda	None
California	Cal. Env. Quality Act— Amendment	Asks about measures to reduce wasteful or inefficient energy use
Connecticut	Conn. Env. Policy Act	None
Delaware	Coastal Zone Act	Some industrial applicants are asked direct energy require- ments and sources
Georgia	State Tollway Authority Act manual	None
Hawaii	Hawaii Revised Statutes	None
Indiana	Env. Management Board draft guidelines	None
Maryland	Md. Env. Policy Act— Revised Guidelines	Asks if project will require addi- tional power generation or trans- mission capacity
Massachusetts	Guidelines under Mass. Env. Policy Act	Asks the power requirements and sources of new projects
Michigan	Guidelines under Governor's Exec. Order	Asks "significant additional uses of energy resources or the acqui- sition thereof"
Minnesota	Regs. under Minn. Env. Policy Act	None
Montana	Guidelines under Mont. Env. Policy Act	Asks about "irreversible and irretrievable commitments of ... energy resources"
Nebraska	Dept. of Roads Action Plan	None
New Jersey	Env. Impact Statement Guidelines	Asks about "energy consumption of the project during both the construction and operational phases"
Nevada	Laws of 1971	None
North Carolina	N.C. Env. Policy Act Guidelines	None
South Dakota	S.D. Env. Policy Act	None

Texas	State Env. Policy guidelines	None
Virginia	Guidelines under Va. Env. Policy Act	None
Washington	Guidelines under Wash. Env. Policy Act	None
Wisconsin	Guidelines under Wisc. Env. Policy Act	Asks impact on energy resources

NOTE: These states are all those listed by the U.S. Council on Environmental Quality as having impact statement requirements as of August 1, 1974. The information in this table is derived from a poll conducted in February, 1975, by the Council on the Environment of New York City. In mid-1975, New York State also adopted an environmental impact bill requiring assessment of "effects of the proposed action on the use and conservation of energy resources."

II. NEW ANALYSIS TECHNIQUES

The most accurate way to examine the indirect energy requirements of products or projects is systematically to trace all steps leading to the manufacture of each component. To do this one would have to learn, for instance, where a highway contractor purchased his concrete, and then go to the supplier and study his processes and his suppliers, and so on. This enormously expensive and time-consuming task is beyond the means of most public agencies which must prepare impact statements. It is possible to obtain a close approximation of indirect energy demand, however, through a shortcut known as input-output (I/O) analysis.

A technique first developed before World War II by Wassily Leontief for use in economic planning, I/O analysis details the flow of goods and services in the economy. It is based on tables which show the dollar amount of business transacted between different commercial and industrial sectors.¹³ Although I/O analysis requires a formidable amount of data collection, once the tables are compiled they can be used for many different purposes, and each user does not have to repeat the compilation. At the Center for Advanced Computation of the University of Illinois at Urbana-Champaign, a team of researchers led by Dr. Bruce Hannon has constructed I/O tables tying energy flows to dollar flows. One result has been a set of coefficients relating the direct and indirect energy input of various goods and services to final dollar demand. This method has shown, for instance, that one dollar's worth of asphalt takes about 456,000 British thermal units of energy to produce, while one dollar's worth of a doctor's or dentist's services averages only about 15,000

B.t.u.'s.³⁴

Serious problems limit the utility of I/O analysis. The basic data, collected by the Bureau of Economic Analysis of the U.S. Department of Commerce, are so voluminous that they take several years to compile and process. The latest official I/O tables, released in 1974, cover the economy of 1967. The data, much of which comes initially from the U.S. Censuses of Manufacturers, Transportation, Mineral Industries, and Agriculture, sometimes neglect feedstocks or certain purchased fuels, can be incomplete because of restrictions on corporate information, and do not include the energy expended in making the tools used by an industry in that industry's energy consumption. The overall effect can be an understatement of the energy used by some economic sector. This caution is worth rephrasing: "We are, quite frankly, left with an attitude that any energy analysis must be treated with considerable skepticism and care if it does not have a component of direct contact with individuals involved in the system under analysis."³⁵

The I/O analysis is also incompatible with fluctuating prices, though at least one variant claims to have overcome this problem.³⁶ Most importantly, I/O tables are national or regional aggregates, and in fact they were first devised for analysis of national and regional economies. Since no particular project is likely to fit the national average for such projects precisely, errors will always arise as average figures are applied to specific situations. This may not be a great problem when calculating the energy consumption of materials—there are a limited number of ways to make Portland cement (though admittedly the distance the materials must be transported varies widely)—but a comparison of highways in Manhattan with highways in rural Iowa can prove bothersome. Yet rough figures, or at least orders of magnitude, can still be obtained.

Other complications for environmental analysis, with or without I/O techniques, arise because the environmental impact of one B.t.u. is not always the same as that of another.³⁷ The following criteria are suggested for comparing the impact of different forms of energy:³⁸

- 1) Place utilized. Coal burned in a densely populated city, for instance, does greater damage to health and property than coal burned in a remote region.³⁹

- 2) Control techniques used. Whether an electric power plant has sulfur dioxide scrubbers, for example, helps determine its emissions levels.

- 3) Method of extraction and transport. Strip-mined coal vs.

deep-mined coal,⁴⁰ offshore oil vs. onshore oil, oil moved by ship vs. oil moved by pipeline can all have different environmental impacts.

4) Pollution characteristics of the fuel. Natural gas is by far the cleanest fossil fuel; coal, the dirtiest. Since a much higher portion of the chemical industry's energy consumption than of the primary metals industry's is gas⁴¹ (and much of it is used as a raw material rather than burned), a B.t.u. used by the chemical industry has less environmental impact than one used for primary metals.⁴² However, this gas would most likely have been used elsewhere had the chemical industry not consumed it; so, when one considers the opportunity cost of the natural gas, one finds that the chemical industry should not receive credit for low pollution because it uses gas. In calculating the environmental impact of future energy demands, one must project the *incremental* sources of that energy.⁴³ The Department of the Interior reports that although about 31% of the nation's energy demands in 1975 are met with natural gas, only about 11% of the *increased* energy demands between 1975 and 1980 are expected to be.⁴⁴ Thus the current pollution profile of an energy demand sector does not necessarily inform us about that sector's future pollution profile.

5) Recovered vs. extracted resources. Although paper and paperboard manufacture is relatively energy intensive, 38.3% of the required energy is provided by paper waste products,⁴⁵ which would probably not be available for other energy uses; thus the resource—though not necessarily the pollution—impact of each B.t.u. is lower than it would be if fossil fuel were used exclusively.

6) The amount of energy required to transform the fuel into a usable form, a factor discussed in Section IV, *infra*.

Despite its drawbacks, I/O analysis offers many possibilities for filling environmental and energy research needs.⁴⁶ Some of the areas of inquiry where I/O and related techniques have recently been employed are as follows:

- 1) The economic impact of pollution control on the national⁴⁷ and regional⁴⁸ economies.
- 2) The employment and manpower impact of alternate uses of the Highway Trust Fund,⁴⁹ of various fuel allocation systems,⁵⁰ of federal pollution control and abatement expenditures,⁵¹ of future energy projects,⁵² and of energy conservation.⁵³
- 3) The management of coastal zone resources.⁵⁴
- 4) The environmental impact of consumption patterns of different income groups.⁵⁵
- 5) The flow of water, both directly and embodied in goods, be-

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tween California and Arizona.⁵⁶

6) The energy requirements of various services provided by the State of Oregon.⁵⁷

7) The generation and flow of pollutants and other residuals in the economy.⁵⁸ Related work is underway to assign coefficients to the pollution and solid waste generated by various economic sectors, especially to determine the environmental impact of materials substitutions.⁵⁹

8) The effect of various taxes on energy consumption.⁶⁰

9) The economic impact of new energy technologies.⁶¹

10) The amount of energy consumed and pollution generated by the manufacture of products traded internationally.⁶²

Energy consumption is still the best single indicator of environmental impact, and saving energy usually reduces pollution.⁶³ Further refinements in analytical techniques, however, should be used whenever possible. Several systems approaches to the calculation of environmental impact have been devised. These approaches tend to be more precise than most energy I/O analyses because they rely less on aggregated data. Most, however, are also more cumbersome and expensive.⁶⁴

The next logical development would be a system that would predict the environmental and energy impact of any economic or technological shift, and quantify externalities to a greater extent than previously possible.⁶⁵ A methodology which accounted for all dollar, energy, resource, and pollutant flows would be the ideal system, but there is little hope that we will see such a model in the next decade. A completely satisfactory model of the nation's economy alone has eluded researchers. Otherwise, the goal of "fine-tuning" the economy could be easily achieved. To expect soon a model which will also trace the flow of energy and materials is hopelessly ambitious. The fragmented techniques which already exist to predict such flows nevertheless offer useful guidance to policy-makers, and are as sufficient as most other methods of environmental impact analysis.

It is not suggested that a detailed energy analysis is a necessary part of every environmental impact statement. Instead, the cost of the project could be multiplied by the energy intensity of the relevant input-output sector; if the product exceeded some predetermined threshold for energy impact—say, 500 billion B.t.u.'s—then a detailed energy analysis would be called for.⁶⁶

III. DETAILED APPLICATION: THE WEST SIDE HIGHWAY

To illustrate how indirect energy can be computed using input-output analysis, the example of the West Side Highway (WSH) in Manhattan has been chosen.⁶⁷ The Miller Highway to the south and its northern extension, the Henry Hudson Parkway, together known as the WSH, run along the Hudson River from the Battery, at the southern tip of the island, to the George Washington Bridge, some 12 miles to the north, and beyond to link up with the Saw Mill River Parkway. Built in the 1920's and 1930's by the now-controversial Robert Moses and less-celebrated city officials, the road, elevated for much of its length, had fallen into such disrepair that on December 5, 1973, a trailer truck plunged through the pavement. The future of the highway had already been under active discussion, and this incident, which led to the closing of large parts of the road and the diversion of traffic to once-quiet residential streets, sparked increased activity. In 1974 a joint city-state planning group called the West Side Highway Project (WSHP) presented five alternatives for the future of the roadway, ranging from simple maintenance and repair at a cost of \$86 million to construction of a massive interstate highway through a tunnel in landfill created in the Hudson River, at a cost of \$1150 million.⁶⁸ The latter alternative, called the "out-board", with its promise of revitalizing a depressed construction industry, slowing the exodus of employers from Manhattan's Central Business District, and bringing 90/10 federal Highway Trust Fund matching money into the city, was favored by many economic and political sectors in New York. It was opposed by many leaders in the communities along the route, who feared increased traffic congestion and possible destruction of their cherished Riverside Park,⁶⁹ as well as by most environmental groups in New York City, who predicted that a new interstate highway would bring in more cars and hence more air pollution.

WSHP prepared an environmental impact statement for the five alternatives, and late in this process, almost as an afterthought, decided to mention energy impact. The resulting 311-page draft EIS included only two pages on energy.⁷⁰ These two pages presented an extremely rough discussion of the energy consumption rates of various travel modes, seriously underestimating the energy advantages of mass transit over automobiles in Manhattan,⁷¹ while ignoring both the indirect energy consumption of the vehicles operated on the highway, and the amount of energy required to build the highway. In preparation for a public hearing of the draft EIS held Sept.

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12, 1974, the Council on the Environment of New York City conducted a more detailed energy analysis of the project.⁷² A summary of that analysis is presented here.

First, the average cost of building each alternative (minus right-of-way)⁷³ was multiplied by the I/O coefficient for highway construction, 112,200 B.t.u.'s per dollar.⁷⁴ This was adjusted for inflation,⁷⁵ and for that portion of the construction expenditures which go to engineering, planning, services, and other "soft" functions not included in the 112,200 coefficient.⁷⁶ Different coefficients were then applied for these functions, and for the right-of-way costs, reflecting the lower energy intensity of administration as compared to construction.⁷⁷ Adjustments were made for the different rates of inflation for these two different types of activities.

The results of the calculations are compiled in Table 2.

TABLE 2
CONSTRUCTION ENERGY
(BILLION B.T.U.'s)

Alternative*	Without Transitway	Per Year	With Transitway	Per Year
Maintenance	2,893	?	---	---
Reconstruction	7,659	638	---	---
Arterial	2,325	387	20,434**	2,043
Inboard I ₁	47,993	4,799	56,375	5,637
Inboard I ₂	49,211	4,921	57,593	5,759
Inboard I ₃	48,373	4,837	56,906	5,691
Inboard L	49,592	4,959	58,125	5,812
Outboard O ₁	61,630	6,168	73,194	7,319
Outboard O ₂	63,585	6,358	75,099	7,510
Outboard O ₃	61,562	6,156	72,741	7,274
Outboard O ₄	63,056	6,306	74,235	7,423

*See note 68, *supra*, for a description of the alternatives.

**Rail transitway. All others are express busways.

Construction periods ranged from six years for the arterial without transitway to 12 years for reconstruction. The four variations for both the inboard and the outboard plans are due to different interchange alignments and other small variations.

To put these figures in perspective, the 74 trillion B.t.u.'s required for the outboard with transitway roughly equals 13 million barrels of crude oil or 600 million gallons of gasoline; spread over the estimated 10 years the construction would require, it would annually equal half the gasoline directly consumed by all the passenger cars in Manhattan in a year.⁷⁸

A more exact method of computation would take each material component of the highway and multiply it by its own coefficient, and then compute the fuel requirements of the construction equipment at the site. This was not possible here because coefficients were not available for many of the most important construction materials in the highway, such as stone fill, sand drains, and riprap. An exact analysis would also require consideration of energy at every stage during the design process. The engineer planning an excavation, for instance, would calculate the fuel used by the equipment as well as the other factors normally considered. The analytical job becomes difficult and expensive after the design is complete. However, calculations were made for two materials, concrete and steel, for which coefficients were available. The raw materials for the concrete, for instance, must be mined, shipped, crushed, ground, blended, and put through other operations, all of which consume energy. By the time this was done, the millions of tons of concrete alone which would go into the outboard highway had consumed several times the amount of energy consumed by the *entire* maintenance alternative.⁷⁹

This energy would be consumed in places other than New York. The exporting of energy demands is usually ignored as an impact of new projects. Since indirect energy often exceeds 75% of a construction project's total energy demands,⁸⁰ the actual high-consumption regions of the country are often quite different than appearances would indicate.⁸¹ Not only does the project export energy demands, it also exports a classic good—jobs, and a classic evil—pollution. The steel consumed by the West Side Highway in New York creates jobs, pollution, and energy demands in Pittsburgh. Which city benefits more from this exchange is a question for economists and physicians; whether the government of New York City *should* (since it probably won't) consider this imposition on Pittsburgh in its decision-making is a question for political philosophers. But such commerce of dollars and materials is the essence of an advanced economy with specialized division of labor.

In addition to the energy required to build the highway, the indirect energy consumed by the vehicles which travel it (or which travel because of it) is also important. A project consultant performed a computer analysis of projected traffic volume in 1995 for all of Manhattan,⁸² broken down between automobiles and trucks, and adjusted for the different speeds experienced by different kinds of vehicles on various types of roadways and at different times of the day.⁸³ The result was the projected 1995 direct energy consumption

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of all motor vehicles in Manhattan (except buses, for which no figures were available) based on the consultant's projections. (It did *not* reflect the additional energy consumed in earlier years by vehicles forced to drive at slower speeds around construction sites.) To calculate the indirect energy consumption of the vehicles on the highway, the number of gallons of gasoline for autos for each alternative was converted into B.t.u.'s. Based on work by Eric Hirst of Oak Ridge National Laboratory, this figure was then multiplied by 1.2626 to account for the added energy consumption in refining, transporting, and selling gasoline and motor oil.⁵⁴ Hirst also calculated that an additional 3400 B.t.u.'s are consumed per vehicle mile travelled for other indirect energy demands of urban vehicles—manufacture, transport and sale of the autos, repairs, maintenance, parts, insurance, parking, garaging, and tolls.⁵⁵

A number of critics have questioned the validity of allocating these additional non-gasoline-related energy costs of cars to the roads the vehicles will travel. These are the components of this 3400 B.t.u. figure:

700 is for repairs, maintenance, parts, and parking. This allocation is relatively straightforward, since the amount of such services a car requires is closely related to its mileage; if the differences between one WSH alternative and another are such that one will induce much more traffic than the other, then the additional maintenance, etc. caused by that traffic should be attributed to the WSH.

1600 is for the manufacture, transport and sale of the cars. The relationship between the demand for cars and the availability of highways is very difficult to assess. Some families will own cars no matter what, so long as *some* roadways are available; so perhaps the portion of the vehicle miles traveled (VMT) by people whose car ownership is not affected by the WSH should not be attributed to the WSH. On the other hand, the size of many government and commercial vehicle fleets may well be affected by the WSH, because it could alter their freight movement patterns.

600 is for insurance. Insurance rates (which are related to the administrative costs, and therefore the energy consumption, of the insurance companies and their investments) are not very closely related to the marginal VMT; they are related to the safety of the roadways. So if an interstate highway is indeed safer, then that might mean somewhat lower insurance rates. This would be a minor energy conservation factor which would slightly diminish the energy disadvantages of a large highway (as would the fact that a few new cars would not have to be manufactured, because a few old ones might not crash).

500 is for parking, tolls, and garaging. These are most closely related to

the number of trips made. This analysis has concerned itself with VMT, and not the number of trips; some trips would likely be generated by an interstate WSH but the exact number cannot be determined.

If we use a smaller coefficient of 1700 rather than 3400 to account for these questions of attribution, then the final calculations for total direct and energy consumption differences for operation among the alternatives come to about 8% less than those derived from the 3400 coefficient, well within the margin of error of these calculations.

A similar procedure was followed to calculate the indirect energy consumption of trucks on the highway.⁵⁶

When all the figures were added up, this table was prepared, giving the total direct and indirect energy costs attributable to operation (as opposed to construction) of the highway.

TABLE 3

TOTAL MANHATTAN DIRECT AND INDIRECT VEHICLE CONSUMPTION
(MILLION B.T.U.'S)

Alternative	Consumption	Differences Among Alternatives (Null Plan = 0)
Null Plan (No Action)	126,700	0
Maintenance	134,800	8,100
Reconstruction	133,700	7,000
Arterial	150,700	24,000
Inboard	137,000	10,300
Outboard	133,800	7,100

These results were quite surprising. The figures revealed that vehicles would consume *twice* the energy that the impact statement said they would. They showed that one of the least energy-consuming alternatives was the grandest—the outboard—while the alternative with the greatest operating energy consumption was the modest “arterial” plan, which would involve demolishing the present elevated structure and replacing it merely with an at-grade road.

There are two major complications with these findings:

- 1) No one knows what sort of engine will be predominant in urban automobile design (or if indeed there will be such a thing as an urban automobile) in 1995, so it is impossible to predict the fuel economy of these future vehicles. Thus current fuel economy was calculated, with adjustments for vehicle weight and emission control devices.

2) Traffic forecasting, though rapidly improving, is still a primitive art. One of the recurring debates among highway engineers in the controversy over the WSH was whether the presence of the interstate road would induce new traffic. EPA and the highway opponents thought it would, citing the experience that for decades virtually every new highway in New York City became congested with new traffic within a few months of its opening.⁴⁷ The WSH consultants and the interstate supporters asserted the highway would not induce new traffic, largely because they claimed traffic to be more a function of economic activity than of highways, and because they felt that new parking restrictions would curtail auto use and that no new traffic could enter Manhattan anyway because the bridges and tunnels into the island are already used to capacity.

The findings are primarily a function of the WSH consultants' assumption—whether or not that is tenable—that the WSH would not induce new traffic, and therefore would not become congested. Since a car travelling at 10 m.p.h. consumes far more fuel per mile than one going at 40 m.p.h., if the interstate does indeed allow higher speeds, energy will be saved.⁴⁸ This illustrates the vulnerability of energy analysis of transportation systems to the often tenuous assumptions of highway planners.

If the planners' assumptions are correct, then these findings present a policy quandary, since the roadway which consumed the most energy in construction consumed close to the least for operation, and vice versa. A vital question then becomes whether fuel shortages will be short-term or long-term. If only short-term shortages are foreseen, then one might opt for the design with the lowest construction energy use but higher operation energy use. If the shortages are thought to be chronic, then the alternative with the lowest total energy cost over its entire useful life should be chosen. (This is a problem similar to that faced by financial planners who must predict future interest rates to make investment decisions.)

A complete policy analysis, of course, must also calculate the energy impact of mass transit alternatives to the interstate highway. New York City was not faced with a choice between building a highway or building a mass transit system; the city already has an extensive subway and bus system, so funds for transit along the West Side would probably have gone largely into station and train upgrading and maintenance, with perhaps some money spent on improving the regional rail freight network. Since no official array of transit alternatives had been released, no energy calculations were performed.

However, a number of useful studies demonstrate the energy impact of mass transit projects. An examination of the energy impact of the new BART system in San Francisco found that BART is more energy efficient per passenger mile than automobiles, but not necessarily than buses, when the energy to build and operate all the relevant vehicles, roads, and tracks is considered. The construction energy for BART was a significantly greater portion of the system's total energy costs than is the construction energy for autos and highways. For all modes, the average vehicle occupancy was a key determinant of energy efficiency per passenger mile.¹⁹ A similar study, nationally aggregated, produced these results for the amount of energy consumed per passenger mile, measured in kilowatt-hours, (kWh) including all construction (averaged over the life expectancy of the facility) and operation energy:

TABLE 4
TOTAL ENERGY CONSUMPTION PER PASSENGER MILE²⁰
ENERGY (KWH)

Mode	
Automobile	
3600 pound	1.90
2000 pound	0.98
City Bus	0.66
Rapid Rail	0.71
Personal Rapid Transit	
Small car	2.34
Large car	2.88
Dial-a-Ride	
Gasoline	2.91
Diesel	1.79
Motorcycle	0.62

This table indicates the enormous energy advantages of buses and rapid rail over automobiles.²¹ The data also suggest that such oft-heralded new technologies as Personal Rapid Transit may not be as idyllic as often supposed. The same applies for hydrofoils and short take-off and landing aircraft.²² Making autos smaller and more efficient, and diverting as much auto traffic as possible to buses and subways, hold greater potentials for energy savings.²³

Energy would also be saved by prolonging the lifespan of individual cars, given the large energy cost of building them;²⁴ in fact a reduction in obsolescence makes energy sense for almost all prod-

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ucts. Perhaps in addition to the fuel consumption stickers on new cars and the energy efficiency labels on new appliances, the total manufacturing energy consumption of the product divided by the number of years of its life expectancy should be shown, to give consumers a better idea of the impact of their purchases.⁹⁵

The energy advantages of mass transit over automobiles also indicate that if electric rates are allowed to rise to discourage demand, special arrangements might have to be made for transit systems so that the increased financial pressures do not force curtailed service or higher fares, counterproductively forcing people back to the auto.

Mass transit is so energy efficient that large cities may consume less energy per inhabitant than small ones.⁹⁶ In fact, New York City energy consumption per dollar of money income is 54% below the national average.⁹⁷ Although much of this difference results from a lack of heavy industry within the city borders, another major factor is the large portion of the population that rides subways and buses. It may well be that dense housing developments save energy in various ways—they encourage mass transit use; a smaller portion of their walls face outside, so they lose less heat; and they permit total energy systems with heat recovery, solid waste use, and minimum transmission losses.⁹⁸

Another intriguing issue is the influence of highway safety on energy consumption. Roughly one-fifth of the total production of the automobile industry is required to replace or repair damaged vehicles,⁹⁹ consuming an enormous amount of energy. Thus safety programs, besides their other obvious benefits, may be viewed as an energy conservation measure.

Finally, the less energy-intensive modes of travel such as mass transit and bicycles, tend to cost the traveller less than do more energy-intensive modes, such as automobiles and airplanes. Unless a massive modal shift saves enough money for wage rates to be reduced, travellers will have more disposable income; but more energy, rather than less, could ultimately be consumed if they spend this money on items such as housing, which require more energy than was saved by their modal shift. The same result occurs if the individuals invest their money with financial institutions or corporations that then use it in energy-intensive ways. An activity that consumes a large amount of energy per dollar also usually creates few jobs per dollar, because it is capital—rather than labor—intensive, so energy conservation tends to spur employment.¹⁰⁰

Despite all the uncertainties involved, indirect energy analysis

has major policy implications which are not foreseen in any other way.

IV. OTHER IMPLICATIONS OF ENERGY ANALYSIS

Although scattered, enough indirect energy analysis has been performed to date to have important implications for a variety of public policies in addition to transportation.¹⁰¹

1. Agriculture

An act such as eating meat or fruit seems innocent from an energy perspective, but it is not. Increasing amounts of energy are used on American farms, not only to power tractors and other equipment, but also to serve as the raw material for fertilizer, and to process, transport and store food. An indirect energy analysis reveals that the foods which consume the most energy per calorie and protein yield are meat and poultry, fruit, and processed vegetables; the least energy consuming are fresh vegetables, flour, and cereals.¹⁰² When all of the energy used in growing, processing, transporting and otherwise preparing the food is considered, one glass of milk requires the energy equivalent of one-half glass of diesel fuel; one pound of hamburger demands about three pounds of coal.¹⁰³ Hence, food is grown as much from fossil fuels as from live plants.¹⁰⁴ According to one estimate, the labor-intensive wet-rice agriculture of China produces 250 times as much food energy for each unit of fossil energy expended as does American agriculture¹⁰⁵—though of course it produces far less food per man-hour.

Meat is particularly energy consuming. Livestock are an intermediate processing step, which return only about one-fifth of the food value of what they eat. Thus the energy required to produce five tons of corn will only produce about one ton of beef.¹⁰⁶ To compound matters, cattle increasingly are being herded into enormous feedlots, where instead of grass, they are fed grain which people might otherwise eat. If strip mining in the West reduces available grazing land and forces still more cattle into feedlots, the effect will be exacerbated.¹⁰⁷

An energy analysis of an agricultural project was conducted for the Environmental Impact Assessment Project in Washington, D.C. In analyzing the EIS for a major irrigation project in North Dakota, the researchers independently devised and used almost exactly the same methodology as was used in studying the West Side Highway.¹⁰⁸ They discovered that the Bureau of Reclamation, which pre-

pared the EIS, failed to account for the energy consumption of the materials (sprinklers, pipes, etc.) that would go into the project, and for the construction energy. Though the EIS had mentioned the power which would be lost because water now serving a hydroelectric generating plant would be diverted to irrigation, it did not mention that the hydroelectric generators might have to be replaced by fossil fuel stations at only one-third the efficiency. These indirect effects, when distributed over the 25-year construction period, are far greater than the *direct* energy cost of operating the irrigation project acknowledged by the impact statement. The conclusion was reached that the net food yield would be much larger if the energy that would be consumed by this project were used to manufacture fertilizer which was then shipped to an underdeveloped country like India, where great incremental increases in farm productivity would result from additional fertilizer applications.¹⁰⁹

2. Architecture

Considerable discussion of late has centered around the energy costs of operating buildings, and the need for windows that open, efficient heating and cooling systems, better insulation, and the like. The government is finally accepting the idea that the cost of a building must be calculated, over its entire life, to include fuel and power.¹¹⁰ Less discussion has centered on saving energy during construction itself. However, many authorities now agree that some building standards are too rigid and allow unnecessarily high safety margins, resulting in far greater amounts of energy-consuming materials than are necessary for structural integrity. Greater attention to detail in design could save large amounts of building material and therefore energy—possibly as much as half.¹¹¹

One relevant factor is the choice of material. Since the energy requirements to process different substances vary widely, from 21 kWh per ton for sand and gravel to 207,000 kWh per ton for certain kinds of titanium,¹¹² substitution has great promise. The one measure with the greatest potential seems to be replacing aluminum with steel, because the electrolytic process by which aluminum is extracted from bauxite consumes great quantities of power. It has been estimated that if the four million pounds of aluminum used for exterior covering in the new Sears Tower in Chicago had been replaced by 5.75 million pounds of weathering steel like Cor-Ten, with the same structural characteristics, the energy cost would have been cut by two-thirds and 1.3 million kWh would have been saved.¹¹³ There are other areas as well where steel or other materials

can replace aluminum,¹¹⁴ just as there are places where cotton, wool, or wood could substitute for plastics and synthetics. Some decorative building materials, like white cement, consume excessive amounts of energy in comparison with their substitutes.¹¹⁵ Still more energy can be saved, particularly in small buildings, by using hand-made materials. A conventional brick, for instance, takes about four times as much energy to manufacture as a soil cement brick, which possesses even greater strength and is produced by hand with a block-making ram.¹¹⁶

Another energy consideration in materials is whether they have been or can be recycled. The energy required to produce raw steel from scrap is about 25% of the energy required to make steel from virgin ores. For aluminum, the figure is less than 5%; for paper, 60-70%.¹¹⁷ Not all materials can be recycled, however. About 75% of the copper produced is recyclable, but less than 10% of the titanium, because it is usually dissipated in use.¹¹⁸

There are two final points regarding indirect energy and construction. First, a seldom-mentioned indirect energy cost of space cooling is the heat which air conditioners generate outdoors. The average temperature in cities is at least one degree above that of the countryside, and the difference is partly due to heat from these and other machines.¹¹⁹ Second, though home fireplaces are frequently suggested as a way to save fuel, most of the heat from the fire and some of the air warmed by the heating system can be lost up the chimney, so it is doubtful there is a net gain from fireplaces.¹²⁰

3. *Alternate Energy Sources*

Just as it takes energy to produce aluminum, it takes energy to produce energy. Ten million tons of coal may be buried in a seam, but if it takes three tons worth of energy to extract the ten tons, the seam contains only seven tons of effective energy. The usable resource is the net energy, "what is left after the processing, concentrating and transporting of energy to consumers is subtracted from the gross energy of the resources in the ground."¹²¹ A vast array of rigging, piping, heating, shipping, and other equipment is required for most energy production.¹²² Since the most easily accessible domestic reserves of coal, oil and gas have already been depleted, more and more energy is needed to extract fuel and the net gain is less.¹²³ Domestic natural gas is still the most efficient energy delivery system, but it, too, is getting more difficult to produce.¹²⁴ At least one researcher, perhaps only slightly overstating the matter, has called

the diminishing return on energy investment "the principal force driving world inflation."¹²⁵

Indirect energy analysis has already cast doubts on two new energy sources—oil shale and the fission nuclear reactor. It has been calculated—and disputed—that it actually takes more energy to mine oil shale, extract the oil from it, and convert it into electricity, than is derived from the shale; so every kilowatt of electricity from shale actually *loses* energy.¹²⁶ There may be an energy profit in non-electric uses of shale oil, however. And even if shale oil turns out to have no net energy gain, it might be used to convert the coal used in its production into more versatile oil—so shale could then be viewed as an energy storage and conversion technique, not as a new energy source.¹²⁷

With nuclear power, more energy is required to process—"enrich"—uranium to be used as a reactor fuel, than it takes to process any of the three major fossil fuels.¹²⁸ In fact, uranium enrichment is one of the nation's major consumers of energy. There is considerable disagreement over just how much, if any, net energy is gained by nuclear power. Some commentators have written that the energy invested in enriching uranium is very quickly paid back once the nuclear power plant begins operation; others have calculated that this energy investment is not repaid for many years, conceivably not until all economically recoverable uranium reserves are exhausted.¹²⁹

The role of electricity itself is another point of controversy. Electric power plants are at best 40% efficient and usually closer to 30%.¹³⁰ As mentioned earlier, the increased use of electricity has led to lowered overall energy efficiencies in the United States. Three factors tend to encourage increased electrification: electricity's great convenience, its cleanliness at the point of use (though not at the power plant),¹³¹ and the possibility that one day nuclear and other new power sources will provide electricity without further depleting fossil fuel reserves. In one application of these factors, the planners of a new housing project in New York City decided to use electric rather than oil heat. Though this method would consume 23% more fuel, they found it would become more efficient if and when Consolidated Edison's long-delayed nuclear power plants reached full capacity.¹³² Another factor was that much electric heating is required during the hours of the day when overall electricity demand is low. During the peak hours, Con Edison must employ relatively inefficient gas turbine generators to meet its load; but during the off hours the company can get by on its large baseload

plants, which are more efficient. Finally, the developers used a Con Edison air pollution diffusion model to determine the impact of electric heating vs. oil heating on ground level pollution levels, and they computed that the electric heat would be better because the power plants would release their emissions from tall stacks higher in the atmosphere.¹³³ The New York City Dep't of Air Resources disputes the Con Edison air quality models, claiming that Con Edison power plants have a far greater impact on pollution levels than the utility admits.

Indirect energy analysis has implications for solar energy as well. Though sunlight is an inexhaustible resource, it is so diffuse that a great deal of fossil fuel energy is required to build and operate the equipment used to capture it¹³⁷ and will continue to do so until solar plants have largely displaced fossil fuel plants. Until that time, solar power will pollute, via the fossil fuels needed to capture it—though much less than if fossil fuels were used directly. The estimated upper limits of the net efficiency of various schemes for using solar power range from 3% for energy plantations, in which crops would be grown, dried, and burned for power, and 6% for a large satellite with photovoltaic cells beaming energy to earth, to 55% for a large thermal plant which generates electricity from the heat.¹³⁵ Solar energy, however, has the advantage of adding no additional heat load to the atmosphere (an advantage not realized with the satellite system). Furthermore, the manufacture of silicon solar cells is much more labor-intensive than refining petroleum.¹³⁶

A final point regarding energy sources is that some of the energy inputs can be used again, while others are lost forever. Energy cannot be destroyed, merely converted, but some means of conversion—such as simple burning—turn it into a form which we can never recapture. In energy production, the steel casings in oil drilling, the roof bolts in coal mining, and the oil left in some pumped-out wells, not to mention the fuel burned in producing the fuel, will probably never be usable again. But the steel in an oil refinery, and "the vast materials demands of solar energy collectors are 'deposits in a materials bank' that could possibly be withdrawn later for reuse."¹³⁷ Energy systems should be designed so that a maximum portion of the energy invested in them can be recovered.¹³⁸

4. *Pollution Control*

Critics of the environmental movement frequently claim that ecologists drive up energy demands by their insistence on new

pollution-control equipment.¹³⁹ This argument neglects the finding that the energy costs of such pollution control devices as power plant scrubbers, automobile catalytic converters, and wastewater treatment plants are almost equalled by the energy *savings* from such environmental measures as greater use of mass transit; redesign of automobiles, incineration of solid wastes to generate electricity, and more recycling.¹⁴⁰ One favorite claim is that a ban on the gasoline additive tetraethyl lead (which has severe adverse health effects) consumes extra gasoline and should be opposed. One petrochemist, however, has calculated that the energy consumed by manufacturing the additive exceeds the energy that is saved by using it.¹⁴¹

Some pollution control measures may still be counter-productive. Consider, for example, particulate control from coal-burning boilers. Such control is conventionally achieved by electrostatic precipitators, large energy-consuming devices which usually achieve 85-95% abatement. If one wants to achieve continuous 99% abatement, however, two precipitators may be needed, and to achieve 99.9% abatement, three may be required.¹⁴² That last precipitator may cause more pollution than it removes, because of the pollution from the power plant which runs the precipitator. Reaching the last percentage point required to achieve near-zero emissions may therefore be shortsighted, not only economically but also in terms of energy and pollution. For economic reasons, 99.9% abatement has rarely been required.

One pollution control measure which could save energy is the removal of poisonous sulfur from smokestack emissions. The sulfur thus removed could then be used as a substitute for a portion of the petroleum-based asphalt used in road building and repair. The Federal Highway Administration estimates that such substitution could save up to 26 million barrels of petroleum a year.¹⁴³

Most current air pollution regulations merely prescribe that a stationary source of pollution must reduce its emissions by a certain date, but do not specify how this reduction is to be achieved. Installing a control device that removes 25% of the pollutants from a power plant has the same impact on the plant's emissions as not installing a control device but instead increasing the conversion efficiency of the plant from 30% to 40%.¹⁴⁴ The former course is likely to be chosen because it is easier and cheaper. However, the latter course is far superior environmentally because it will save a great deal of fuel, which thus will not have to be extracted, transported, and processed—all operations that consume energy and generate pollu-

tion. A more systematic national strategy of air pollution control might ultimately achieve greater benefits at lower cost than a fragmented local strategy.

The conversion efficiency of power plants—the portion of their fuel input which they return as electricity—is a key consideration. Only a tiny fraction of energy research and development expenditures over the past decade was devoted to improving the efficiency of the combustion process, though it is in that process where most energy losses occur.¹⁴⁵ Federal research priorities must give greater emphasis to improving fuel use efficiency, a policy that the Federal Energy Administration is beginning to recognize.¹⁴⁶ The efficiency of power plants has not significantly improved in more than ten years, but more research might change that. Conventional power plants, however, are limited by the theoretical Carnot efficiency of about 40%, unless waste heat is recovered and reused.

Indirect energy consumption, which is tied to capital investment, is more sensitive to fluctuations in the national economy than is direct energy consumption, which reflects current operations.¹⁴⁷ Therefore certain trends in air quality may be caused more by the state of the economy than by the direct successes or failures of environmental protection.

Solid waste disposal is another environmental measure with great energy potential. Some 46% of all municipal solid waste is paper,¹⁴⁸ much of which can be recovered and used as a supplemental electric utility fuel¹⁴⁹ just as much waste crankcase and other oil could be reclaimed.¹⁵⁰ The energy costs of collection and separation would probably be far below the energy recaptured. In fact, environmental impact statements for projects where solid waste is a byproduct should mention the lost energy potential in that waste.

Indirect energy analysis of packaging reveals the energy lost by throwaway cans and bottles. Calculating all of the costs of manufacture and distribution, along with the average life cycle of a returnable bottle, it was discovered that a throwaway bottle uses three times as much energy and a throwaway can uses four times as much energy as a returnable bottle.¹⁵¹ Surprisingly, a polyethylene bag costs less energy to make than a paper bag.¹⁵² And the common container which takes the *least* energy to make of any its size is the wooden berry basket.¹⁵³

Each missed opportunity for energy conservation is a short-term environmental threat, not only because of the pollution created by the needless energy generation, but also because today's squandering of fuel contributes to tomorrow's energy emergency, in which

bans on high-sulfur fuel, offshore oil drilling and strip mining may be swept aside in the immediate clamor for energy.

CONCLUSION

This article has demonstrated that indirect energy analysis can have surprising and profound implications for environmental policy. It does not advocate, as others have,¹⁵⁴ the *substitution* of energy analysis for all other environmental impact measurements, nor does it suggest opening the Pandora's box of *separate* energy impact statements.¹⁵⁵ But the federal, state and local governments should not forgo this opportunity for new forms of environmental analysis and new vistas of energy conservation. The conservation pleas of the winter of 1973-74 emphasized austerity and postponement. They might have also focused on substitution, but they did not, partly because little indirect energy analysis apparently came to the attention of policy makers. If those responsible for implementing NEPA, the nation's premier environmental law, continue to ignore the implications of indirect energy, the trauma Americans experienced following the Arab oil embargo of 1973 could be visited upon the United States many times to come.

FOOTNOTES

*Policy Analyst, Council on the Environment of New York City. I would like to thank these persons for their help with my net energy work, though I alone am responsible for any errors in this article: Malcolm Baldwin, U.S. Council on Environmental Quality; George Bugliarello, Polytechnic Institute of New York; Clark Bullard and Robert Herendeen, University of Illinois; Ruben Brown and William Crowell, Council on the Environment of New York City; Joel Darmstadter, Resources for the Future; Edward Ferrand, New York City Dep't of Air Resources; Harold Gershinowitz, Rockefeller University; William Hoppen, Ardsley-on-Hudson, New York; H.G. Mike Jones, Brookhaven National Laboratory; Charles Komanoff, Council on Economic Priorities; Lewis Kwit, New York City Planning Commission; Gerald Leach, International Institute for Environment and Development; Michael Miernik, West Side Highway Project; Thomas Moss, office of U.S. Representative George Brown; Dick Netzer, New York University; Robert Rickles, Institute for Public Transportation; and Diane Serber, Richard Stein & Associates.

¹ The word "consumers" is used colloquially, because, of course, energy can be neither created nor destroyed, merely converted. Many conversion processes—most importantly, combustion—transform energy into a state of entropy from which it cannot be retrieved.

² R.A. HERENDEEN, *THE ENERGY COST OF GOODS AND SERVICES* (ORNL-NSF-EP-58, Oak Ridge National Laboratory, 1973).

³ An interesting, but insignificant, implication is that manual razors ultimately consume more operating energy than electric razors, because the energy needed to heat the water most men use in shaving manually exceeds by several times the power needed to drive an electric shaver. H. GERSHINOWITZ & M. GERRARD, *ENERGY AND THE NEW YORK CITY ENVIRONMENT* (Council on the Environment of New York City, 1974) [hereinafter cited as GERSHINOWITZ]. Cf. advertisement, Continental Oil Co., Wall Street J., Dec. 10, 1974, at 11.

⁴ The theory of the energy basis of economics and society has been thoroughly explored in H.T. ODUM, *ENVIRONMENT, POWER, AND SOCIETY* (Wiley-Interscience 1971). For a summary of Odum's views by one of his colleagues, see T.A. Robertson, *Systems of Energy and the Energy of Systems*, 60 SIERRA CLUB BULL. 21-23 (March 1975).

⁵ COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY—1973*, at 266 (Annual) [hereinafter cited as ENV. QUALITY].

⁶ In other words, energy use has been declining in relation to the Gross National Product. Whether energy productivity has been declining as a percentage of that portion of the GNP which represents production of real goods and services, rather than that which reflects negative externalities, is open to question.

⁷ NATIONAL ECONOMIC RESEARCH ASSOCIATES, *ENERGY CONSUMPTION AND GROSS NATIONAL PRODUCT IN THE UNITED STATES: AN EXAMINATION OF A RECENT CHANGE IN THE RELATIONSHIP* (1971); J. TANSIL, *RESIDENTIAL CONSUMPTION OF ELECTRICITY, 1950-1970* (ORNL-NSF-EP-51 Oak Ridge National Laboratory 1973); BUREAU OF THE CENSUS, SOCIAL AND ECONOMIC STATISTICS AD., DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES—1974*, at 374, 517 [hereinafter cited as STATISTICAL ABSTRACT OF THE U.S.].

⁸ See B. Commoner, M. Carr, and P.J. Stamler, "The Causes of Pollution," 13 *Environment* 2-19 (April 1971).

^{9,1} 42 U.S.C.A. §§ 4321 *et seq.* (Supp. 1975).

⁹ ENV. QUALITY—1974, *supra* note 5, at 389.

¹⁰ *Administration Split by Proposal to Waive NEPA on Energy*

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Projects, 4 BNA ENV. REP. 1839 (March 8, 1974); *Peterson Says Administration Will Not Recommend Changes in NEPA This Session*, 4 BNA ENV. REP. 2024 (April 5, 1974).

¹¹ In fact, only the pipeline was significantly delayed. B. Rosner, *The National Environmental Policy Act of 1969 and the Energy Crisis: The Road to Alaska*, 10 J. LAW & SOC. PROB. 265, 269 (1974).

¹² STANFORD RESEARCH INSTITUTE, PATTERNS OF ENERGY CONSUMPTION IN THE UNITED STATES 152 (Office of Science and Technology, Executive Office of the President, 1972) [hereinafter cited as PATTERNS OF ENERGY CONSUMPTION].

¹³ 42 U.S.C.A. § 4332 (C)(iv), (v).

¹⁴ 38 Fed. Reg. 20550, 20553 (1973).

¹⁵ *Id.* at 20558. *Cf.* ENV. QUALITY—1973, *supra* note 5, at 235; and 40 Fed. Reg. 16814, 16819, 16821 (1975).

¹⁶ *Cf.* *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark., 1971).

¹⁷ *E.g.*, ENV. QUALITY—1974, *supra* note 5, at 411; COMPTROLLER GENERAL OF THE U.S., *Improvements Needed in Federal Efforts to Implement the NEPA of 1969*, REPORT TO THE HOUSE SUBCOMMITTEE ON FISHERIES AND WILDLIFE OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES 29 (B-170186, GAO, May 18, 1972) [hereinafter cited as *Improvements Needed in Federal Efforts to Implement NEPA*]; G.A. ENK, *BEYOND NEPA: CRITERIA FOR ENVIRONMENTAL IMPACT REVIEW* 85 (Rensselaerville, N.Y.; The Institute on Man and Science, 1973).

¹⁸ *National Helium Corp. v. Morton*, 326 F. Supp. 151 (D. Kan., 1971).

¹⁹ *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356 (E.D. N.C., 1972).

²⁰ *Daly v. Volpe*, 350 F. Supp. 252 (D. Wash. 1972), *aff'd on rehearing*, 326 F. Supp. 868 (D. Wash. 1971).

²¹ F.R. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* 222 (Resources for the Future, 1973); H.J. Yarrington, *The National Environmental Policy Act*, 4 BNA ENV. REP. 29, Monograph No. 17 (1974); N. ORLOFF, *Suggestions for Improvement of the Environmental Impact Statement Program*, in ENVIRONMENTAL IMPACT ANALYSIS: PHILOSOPHY AND METHODS 34 (University of Wisconsin Sea Grant Program, 1972); Letter from the Environmental Protection Agency to the Council on Environmental Quality, cited in *Improvements Needed in Federal Efforts to Implement NEPA*, *supra* note 17, at 29-30; R.N.L. Andrews, *Environmental Policy And Administrative Change: The*

National Environmental Policy Act Of 1969, 1970-71, at 433, 493 (unpublished doctoral dissertation, Dept. of City and Regional Planning, University of North Carolina, 1972).

²² Private letter to the author written by Malcolm Baldwin, April 25, 1975.

²³ See, e.g., L.B. Leopold, *et al.*, *A Procedure for Evaluating Environmental Impact*, GEOLOGICAL SURVEY CIRCULAR 645, (Dep't of the Interior, Geological Survey 1971); M.L. WARNER & E.H. PRESTON, *A REVIEW OF ENVIRONMENTAL IMPACT ASSESSMENT METHODOLOGIES*, (EPA-600/5-74-016 Office of Research and Development, Environmental Protection Agency, July 1974); DEPT. OF LANDSCAPE ARCHITECTURE, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, *ENVIRONMENTAL IMPACT STATEMENTS: A HANDBOOK FOR WRITERS AND REVIEWERS*, (NTIS PB 226 276/4WP, Illinois Institute for Environmental Quality, Aug. 1973); L.E. WALTON, JR., & J.E. LEWIS, *A MANUAL FOR CONDUCTING ENVIRONMENTAL IMPACT STUDIES* (NTIS PB 210 222, Virginia Highway Research Council, July 1971).

²⁴ See Proposed FEA Reg. § 203, 40 Fed. Reg. 26279 (1975). Though FEA's massive plan for "Project Independence" contains a good discussion of conservation options for industry, it does not integrate indirect energy into its discussions of other economic sectors. See, *Project Independence infra* note 41, especially Appx. AIII.

²⁵ See Proposed GSA Regs. 1095, 40 Fed. Reg. 27733 (1975).

²⁶ *House Committee Staff Issues Report on EPA, CEQ Impact Statement Efforts*, 5 BNA ENV. REP. 265 (June 28, 1974).

²⁷ Env. Quality—1974, *supra* note 5, at 401.

²⁸ *Id.* at 402; T.C. TRZYNA, *ENVIRONMENTAL IMPACT REQUIREMENTS OF THE STATES: NEPA'S OFFSPRING 19022* (EPA-600/5-73-006 Office of Research and Development, Environmental Protection Agency, April 1974).

²⁹ Also to be watched with interest is a suit filed in U.S. District Court for the Southern District of New York in December 1974, in which a number of environmental groups and individuals in New York City sued the city, state, and federal governments for filing an inadequate environmental impact statement for the West Side Highway Project, partly on the grounds that the statement failed to discuss energy impact. *Action for Rational Transit v. West Side Highway Project*, Case No. 74 Civ. 5572 (S.D.N.Y., filed Dec. 1974).

³⁰ *Cf.* *Natural Resources Defense Council v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

³¹ 40 C.F.R. § 52 (1974).

³² 42 U.S.C.A. § 1857 et seq. (Supp. 1974).

³³ W.W. Leontief, *Input-Output Economics*, 185 SCIENTIFIC AMERICAN 15-21 (Oct. 1951).

³⁴ C.W. BULLARD & R.A. HERENDEEN, ENERGY USE IN THE COMMERCIAL AND INDUSTRIAL SECTORS OF THE U.S. ECONOMY, 1963, Table 3f, CAC DOCUMENT No. 105 (Center for Advanced Computation, Univ. of Illinois, 1973) [hereinafter cited as BULLARD & HERENDEEN]. Somewhat more recent figures may be found in R.A. HERENDEEN & C.W. BULLARD, ENERGY COST OF GOODS AND SERVICES, 1963 AND 1967, CAC DOCUMENT No. 140 (Center for Advanced Computation, 1974).

³⁵ R.S. BERRY, M.F. FELS & H. MAKINO, *A Thermodynamic Valuation of Resource Use: Making Automobiles and Other Processes*, in ENERGY: DEMAND, CONSERVATION, AND INSTITUTIONAL PROBLEMS 505 (M.S. Macrakis ed. 1974) [hereinafter cited as BERRY, FELS & MAKINO].

³⁶ E.A. Hudson & D.W. Jorgenson, *U.S. Energy Policy and Economic Growth, 1975-2000*, 5 BELL J. OF ECON. AND MANAGEMENT SCI. 461 (Autumn 1974).

³⁷ A relevant thermodynamic issue is the varied amount of work available from different forms of energy, a factor which must be included in detailed energy calculations. Much net energy discussion is muddled by confusion over this point. See OFFICE OF THE CHIEF ENGINEER, FEDERAL POWER COMMISSION, STAFF REPORT: A TECHNICAL BASIS FOR ENERGY CONSERVATION 14, (FPC/OCE/2, April, 1974) [hereinafter cited as A TECHNICAL BASIS FOR ENERGY CONSERVATION]; W.D. Metz, *Energy Conservation: Better Living Through Thermodynamics*, 188 SCIENCE, 820-21 (May 1975).

³⁸ For an alternative set of criteria with somewhat different aims, see FEDERAL ENERGY AD., PROJECT INDEPENDENCE REPORT Appx. IV., at 202-82 (November 1974) [hereinafter cited as PROJECT INDEPENDENCE].

³⁹ A national allocation program of *clean* fuels would help resolve this problem. See GERSHINOWITZ, *supra* note 3 at 3.

⁴⁰ For an attempt at quantification of the different social costs of deep-mined and strip-mined coal, see G.E. Dials & E.C. Moore, *The Cost of Coal*, 8 APPALACHIA 1-29 (Appalachian Regional Commission, Oct.-Nov. 1974).

⁴¹ THE CONFERENCE BOARD, ENERGY CONSUMPTION IN MANUFACTURING 63 (Ballinger, 1974). [hereinafter cited as ENERGY CONSUMPTION IN MANUFACTURING].

⁴² The proportion of industrial energy use that came from gas increased from 22.7% in 1947 to 46.5% in 1971, so though total

industrial energy consumption increased 69.4% in that period the environmental impact did not increase proportionately. SUBCOMMITTEE ON ENERGY OF THE HOUSE COMMITTEE ON SCIENCE AND ASTRONAUTICS, *ENERGY FACTS*, 93rd Cong., 1st Sess., ser. H at 50 (1973) [hereinafter cited as *ENERGY FACTS*].

⁴² This idea was proposed to the author by Charles Komanoff of the Council on Economic Priorities.

⁴³ STATISTICAL ABSTRACT OF THE U.S., *supra* note 7, at 515.

⁴⁴ This figure relates to a percentage of total energy consumption for 1971. See *ENERGY CONSUMPTION IN MANUFACTURING*, *supra* note 41, at 590-91.

⁴⁵ See generally W. Leontief, *Environmental Repercussions and the Economic Structure: An Input-Output Approach*, ENVIRONMENTAL DISRUPTION: A CHALLENGE TO SOCIAL SCIENTISTS, (S. Tsuru ed., Asahi Evening News, 1970), reprinted in 52 REVIEW OF ECON. AND STATISTICS 262-71 (Aug. 1970); H.H. Stoevener & E.N. Castle, *Input-Output Models and Benefit-Cost Analysis—Water Resources Research*, 47 J. OF FARM ECON. 1572-79 (1965).

⁴⁶ A.P. Carter, *Energy, Environment, and Economic Growth*, 5 BELL J. OF ECON. AND MANAGEMENT SCI. 578-92 (Autumn 1974); CHASE ECONOMETRIC ASSOCIATES, THE MACROECONOMIC IMPACTS OF FEDERAL POLLUTION CONTROL PROGRAMS, (Prepared for the U.S. Council on Environmental Quality, Jan. 1975); I. GUTMANIS, NATIONAL PLANNING ASS'N, THE GENERATION AND COSTS OF AIR, WATER, AND SOLID WASTE POLLUTION: 1970-2000, (Brookings Institution, 1973).

⁴⁷ W.H. MIERNYK & J.T. SEARS, AIR POLLUTION ABATEMENT AND REGIONAL ECONOMIC DEVELOPMENT: AN INPUT-OUTPUT ANALYSIS (Lexington Books, 1974); F. GIARRATANNI & L.C. THOMPSON, AIR POLLUTION ABATEMENT, TECHNOLOGICAL CHANGE, AND RELATIVE PRICES: A REGIONAL INPUT-OUTPUT ANALYSIS, (West Virginia University, Regional Research Institute, Jan. 1974).

⁴⁸ R. Bezdek and B. Hannon, *Energy, Manpower and the Highway Trust Fund*, 185 SCIENCE 669 (Aug. 23, 1974) [hereinafter cited as Bezdek and Hannon].

⁴⁹ A.P. Carter, *Applications of Input-Output Analysis to Energy Problems*, 184 SCIENCE 325 (April 19, 1974); Statement of A.P. Carter, in *Hearings Before the Joint Economic Comm., Subcomm. on International Economics on the Economic Impact of Petroleum Shortages*, 93rd Congress, 1st sess. 31-49 (Dec. 1974); ARTHUR D. LITTLE, INC., U.S. PETROCHEMICAL INDUSTRY IMPACT ANALYSIS: A REPORT TO THE PETROCHEMICAL ENERGY GROUP, in *Hearings Before the*

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Senate Comm. on Finance, Subcomm. on Energy, on Fiscal Policy and the Energy Crisis, 93rd Cong., 1st Sess. 518-23 (Nov. 1973). Cf. *Input-Output: Sizing up the squeeze on energy*, BUS. WEEK, Jan. 19, 1974, at 62.

⁵¹ BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1836 *IMPACT OF FEDERAL POLLUTION CONTROL AND ABATEMENT EXPENDITURES ON MANPOWER REQUIREMENTS* (1975).

⁵² I. GUTMANIS, *THE DEMAND FOR SCIENTIFIC AND TECHNICAL MANPOWER IN SELECTED ENERGY-RELATED INDUSTRIES, 1970-1985: A METHODOLOGY APPLIED TO A SELECTED SCENARIO OF ENERGY OUTPUT, A SUMMARY* (National Planning Ass'n, Sept. 1974).

⁵³ B. Hannon, *Energy Conservation and the Consumer*, 189 SCIENCE 95-102 (July 11, 1975); B. Hannon, *Options for Energy Conservation*, TECHNOLOGY REV., Feb. 1974, at 25-31.

⁵⁴ J.C. HITE & E.A. LAURENT, *ENVIRONMENTAL PLANNING: AN ECONOMIC ANALYSIS—APPLICATIONS FOR THE COASTAL ZONE* 25-38 (Praeger, 1972).

⁵⁵ M.B. Olsen, et al., *Studies in Environment*, 4 CONSUMPTION DIFFERENTIALS AND THE ENVIRONMENT, (EPA-600/5-73-012d, Environmental Protection Agency, Office of Research and Development, Feb. 1974).

⁵⁶ H.O. CARTER & D. IRERI, *Linkage of California-Arizona Input-Output Models to Analyze Water Transfer Plans*, in *APPLICATIONS OF INPUT-OUTPUT ANALYSIS*, 139-67 (A.P. Carter & A. Brody eds. 1970).

⁵⁷ Oregon Governor Tom McCall's Task Force on Energy, *Oregon's Energy Perspective* 126 (1973), reprinted in *Hearings on the Energy Information Act of 1974 Before the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 2d sess., ser. 93-94, pt. II, at 964 (1974) [hereinafter cited as *Senate Hearings*].

⁵⁸ I. Gutmanis, *Input-Output Models in Economic and Environmental Policy Analysis*, IEEE TRANSACTIONS ON SYSTEMS, MAN AND CYBERNETICS, 1975 (forthcoming); J.H. Cumberland & B.N. Stram, *Empirical Results from Application of Input-Output Models to Environmental Problems* (Bureau of Bus. and Econ. Research, Univ. of Maryland), prepared for the Sixth International Conference on Input-Output Techniques, Vienna, April 22-26, 1974, revised, Feb. 1975; S. FELD & N. RORHOLM, *ECONOMIC GROWTH AND THE GENERATION OF WATERBORNE WASTES*, MARINE TECHNICAL REPORT No. 12, (Marine Advisory Service, Univ. of Rhode Island, 1973).

⁵⁹ R.U. AYRES & I. GUTMANIS, *Technological Change, Pollution and Treatment Cost Coefficients in Input-Output Analysis*, in Vol.

III of COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE RESEARCH REP., POPULATION, RESOURCES, AND THE ENVIRONMENT 313-37 (1972) [hereinafter cited as POPULATION, RESOURCES AND THE ENVIRONMENT]. The coefficients are similar in application to those in ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF AIR PROGRAMS, COMPILATION OF AIR POLLUTANT EMISSION FACTORS (REVISED) (NTIS PB 209-559 1972). A further extension of this concept may be found in B.W. CARNOW, ET AL., HEALTH EFFECTS OF FOSSIL FUEL COMBUSTION: A QUANTITATIVE APPROACH (American Public Health Ass'n, Sept. 1974). For the indirect water consumption of various products, see 138 SCIENCE 489-91 (Oct. 26, 1962).

⁴⁰ E.A. Hudson & D.W. Jorgenson, *U.S. Energy Policy and Economic Growth, 1975-2000*, 5 BELL J. OF ECON. AND MANAGEMENT SCI. 461 (Autumn 1974); C.W. BULLARD, ENERGY CONSERVATION THROUGH TAXATION, CAC DOCUMENT No. 95 (Center for Advanced Computation, Univ. of Ill., Feb. 4, 1974).

⁴¹ J.E. JUST, *Impacts of New Energy Technology Using Generalized Input-Output Analysis*, in ENERGY: DEMAND, CONSERVATION AND INSTITUTIONAL PROBLEMS 113-128 (M.S. Macrakis ed. 1974).

⁴² C.W. BULLARD AND R.A. HERENDEEN, ENERGY IMPACT OF CONSUMPTION DECISIONS 26, CAC DOCUMENT No. 135 (Center for Advanced Computation Univ. of Illinois, October 1974); I. Walter, *The Pollution Content of American Trade*, 10 W. ECON. J. 61 (Dec. 1972); M. Gerrard, *Of Arms and Energy*, letter to the editor New York Times, March 13, 1975; A.B. Lovins, *On Total Energy Costs*, 5 Eco, July 8, 1974, at 5.

⁴³ "The evidence is abundant (but disorganized and dispersed) that the path of least energy consumption is also the path of least disruption and insult to the environment," in E.E. HUGHES, E.M. DICKSON, & R.A. SCHMIDT, CONTROL OF ENVIRONMENTAL IMPACTS FROM ADVANCED ENERGY SOURCES 84 (EPA-600/2-74-002 Office of Research and Development, Environmental Protection Agency, 1974) [hereinafter cited as HUGHES, DICKSON & SCHMIDT].

⁴⁴ For a typology of different sorts of energy analysis, see M. Kenward, *How to cook the energy accounts?* 66 NEW SCIENTIST 205 (April 24, 1975). Cf. P.F. Chapman, *Energy Costs: A Review of Methods*, 2 ENERGY POLICY 91 (June 1974); D.R. LIMAYE, R. CILIANO & J.R. SHARKO, *Quantitative Energy Studies and Models: A Review of the State of the Art*, ENERGY/POLICY/EVALUATION (D.R. Limaye ed., 1974); M.W. Gilliland, *Energy Analysis and Public Policy*, 189 SCIENCE 1051 (Sept. 26, 1975).

Some of the non-I/O methods are:

—The “materials-balance” approach. See A.V. KNEESE, R.U. AYRES, & R.C. D'ARGE, *ECONOMICS AND THE ENVIRONMENT: A MATERIALS BALANCE APPROACH* (Resources for the Future, 1970). Cf. ENV. QUALITY—1972, *supra* note 5, at 22-23; B.T. BOWER & D.J. BASTA, *RESIDUALS—ENVIRONMENTAL QUALITY MANAGEMENT: APPLYING THE CONCEPT* (Center for Metropolitan Planning and Research, Johns Hopkins Univ., Oct. 1973). See also P.A. VICTOR, *ECONOMICS OF POLLUTION* 55 (Macmillan, 1972), which integrates materials balance and input-output models.

—The Matrix of Environmental Residuals from Energy Systems (MERES) program of the Council on Environmental Quality. See ENV. QUALITY—1974, *supra* note 5, at 290-304; COUNCIL ON ENVIRONMENTAL QUALITY, *MERES AND THE EVALUATION OF ENERGY ALTERNATIVES*, (CEQ, May 1975).

—The Strategic Environmental Assessment System (SEAS) of the Environmental Protection Agency. See ENV. QUALITY—1974, *supra* note 5, at 290-304.

—The Resource and Environmental Profile Analysis (REPA) methodology of Midwest Research Institute (MRI). MRI is a private consulting firm in Kansas City, Missouri, and several of its reports are kept confidential at the request of MRI's clients. Among those reports that clients have released to the public, however, are R.G. Hunt & R.O. Welch, *Resource & Environmental Profile Analysis of Plastics & Non-Plastics Containers*, prepared for the Society of the Plastics Industry (Nov. 1974); *Resource and Environmental Profile Analysis of Ten Beverage Container Systems*, prepared for Film Dept., E.I. duPont de Nemours and Co., (Sept. 24, 1974); R.G. Hunt, et al., *Resource and Environmental Profile Analysis of Nine Beverage Container Alternatives: Final Report*, prepared for the Office of Solid Waste Management Programs, Environmental Protection Agency (EPA/530/Sw-91c, 1974); and R.O. Welch, *The Energy Requirements of Meal Preparation: A Comparison of Restaurant vs. Home*, prepared for the National Restaurant Ass'n, (July 12, 1974).

“An example of the sorts of results which might be expected can be found in M.R. DOHAN AND P.F. PALMEDO, *THE EFFECT OF SPECIFIC ENERGY USES ON AIR POLLUTANT EMISSIONS IN NEW YORK CITY: 1970-1985* (BNL 19064, Energy Systems Analysis Group, Brookhaven National Laboratory, 1974). This report, though not an I/O analysis, contains an extremely useful “reference energy system,” tracing the flow of energy in the New York City area, but it does not include indirect energy inputs from outside the region. COUNCIL ON ENVIRON-

MENTAL QUALITY, ENERGY AND THE ENVIRONMENT: ELECTRIC POWER (1973) [hereinafter cited as ENERGY AND THE ENVIRONMENT: ELECTRIC POWER] discusses the environmental impacts of energy flow throughout the country, but not indirect energy.

⁶⁶ The idea was proposed to the author in a private letter written by Professor Clark Bullard of the University of Illinois (March 31, 1975).

⁶⁷ This has particular relevance because the largest portion of impact statements are filed for transportation projects. ENV. QUALITY—1974, *supra* note 5, at 359.

⁶⁸ The five alternatives were: (1) maintenance—extensive repair of roadway and replacement of some structural components, \$86 million; (2) reconstruction—demolition of old roadway and construction of a new one with approximately the same configuration, \$227 million; (3) arterial—demolition of old roadway and replacement with at-grade road, \$76 million; (4) inboard—demolition of old roadway and replacement with partially below-grade interstate highway, with supplemental service roads, \$900 million; and (5) outboard—demolition of old roadway and replacement with supplemental service roads, and new park or other land created on top, \$1150 million.

⁶⁹ Though a state statute known as the Blumenthal amendment, N.Y. Highway Law § 340-a (McKinney, Supp. 1974-75) outlawed any construction through the park, the author observed at public hearings and private meetings that residents feared that the law might not stand, and even if it did, that construction adjacent to the park would disrupt the park itself. See, Ted Wolner, *Riverside Park: Now You See It, Soon You Won't*, Village Voice, Oct. 17, 1974, at 42. New York Times, April 24, 1974, at 43, col. 1.

⁷⁰ FED. HIGHWAY AD., DEP'T OF TRANSPORTATION, and N.Y.S. DEP'T OF TRANSPORTATION, WEST SIDE HIGHWAY PROJECT ENVIRONMENTAL IMPACT STATEMENT 220-221 (1974) [hereinafter cited as WEST SIDE HIGHWAY PROJECT EIS].

⁷¹ The EIS stated that subways are about twice as energy efficient as automobiles. *Id.* at 220. The total energy intensity in the 31-county New York metropolitan region (1970) was 3,124 B.t.u. per passenger mile (B.t.u./PMT) for subways, with an average occupancy of 23.5 persons per vehicle, and 6,508 B.t.u./PMT for automobiles, with an average occupancy of 1.5. REGIONAL PLAN ASS'N & RESOURCES FOR THE FUTURE, REGIONAL ENERGY CONSUMPTION 15 (Regional Plan Ass'n, 1974) [hereinafter cited as REGIONAL ENERGY CONSUMPTION]. Lower average auto speeds, however, predominate

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in the West Side compared with the rest of the region. See, Creighton, Hamburg, Inc., *West Side Highway Transportation Analysis*, prepared for Parsons, Brinckerhoff, Quade and Douglass (March 15, 1974) [hereinafter cited as *West Side Highway Transportation Analysis*]. This suggests an auto energy intensity of closer to 13,000 B.t.u./PMT. When peak hours are included in the calculation for West Side subway efficiency, an occupancy rate of 70 seems reasonable, reducing subway energy intensity to 1,049 B.t.u./PMT, or approximately one/twelfth the auto energy intensity. The uncertainties mean that the figure might be as high as one/fifth, but certainly not as high as the West Side Highway Project's (WSHP) one/half estimate.

¹² M. Gerrard, *The Energy Impact of West Side Highway Alternatives, Statement Before West Side Highway Project Public Hearing* (Sept. 12, 1974; revised Oct. 28, 1974).

¹³ WEST SIDE HIGHWAY PROJECT EIS, *supra*, note 70, at 304.

¹⁴ Bezdek and Hannon, *supra*, note 49 (1963 coefficients were used).

¹⁵ A deflator of 0.565, from the Dep't of Commerce cost index for construction, was used to convert the 1963 dollars in the I/O tables into the 1973 cost estimates of the WSHP. Telephone conversation with Dep't of Commerce Regional Librarian, New York (Sept. 1974). Other useful indices may be found in the FEDERAL HIGHWAY AD., DEP'T OF TRANSPORTATION, PRICE TRENDS FOR FEDERAL-AID HIGHWAY CONSTRUCTION, 1967 BASE, FIRST QUARTER 1975. A further refinement would involve accounting for the differences in labor and material costs between New York and the United States as a whole.

¹⁶ The figures used were 0.80 for inboard and outboard, and 0.75 for arterial, maintenance, and reconstruction, computed from data contained in WEST SIDE HIGHWAY PROJECT EIS, *supra*, note 70, at 304.

¹⁷ A coefficient of 26,500 was used, which is applicable to administrative functions. See BULLARD & HERENDEEN, *supra*, note 34.

¹⁸ REGIONAL ENERGY CONSUMPTION, *supra*, note 71, at 35.

¹⁹ The WSHP estimates that the inboard alternative, for example, required 1.7 million cubic yards of concrete. WEST SIDE HIGHWAY PROJECT DESIGN REPORT 7-9 (West Side Highway Project, 1974). The August, 1974 average price of concrete was \$22.76/cubic yard. ENGINEERING NEWS-RECORD (Aug. 7, 1974). The most recent Bureau of Labor Statistics Wholesale Price Index for concrete was 146.2 (1967=100), and in 1963 was approximately 96.8. With this information, the 1963 value of concrete required for the inboard (I₁) alter-

native was calculated. The primary energy intensity of cement is 433,124 B.t.u./dollar (in 1963 dollars). BULLARD & HERENDEEN, *supra*, note 34. From this the energy cost of the concrete for the inboard was calculated to be 10,840,144 million B.t.u. A similar calculation was made for steel, using a WSHP estimate of 119 million pounds of structural steel for the inboard, an IRON AGE (trade magazine) cost average for 1963 of \$5.50/pound for structural steel shapes, and an energy intensity index of 262,460 for steel. The result was 1,717,500 million B.t.u. Telephone conversation with IRON AGE (Sept. 1974).

There are a number of different sets of coefficients for the energy content of materials, some keyed to cost in dollars, others keyed to weight in pounds or other physical factors. These include coefficients found in BULLARD & HERENDEEN, *supra*, note 34; ENERGY CONSUMPTION IN MANUFACTURING, *supra*, note 41; STANFORD RESEARCH INSTITUTE, PATTERNS OF ENERGY CONSUMPTION IN THE UNITED STATES 152 (Office of Science and Technology, Executive Office of the President, 1972) [hereinafter cited as PATTERNS OF ENERGY CONSUMPTION]; ENERGY FACTS, *supra*, note 42, at 79-83; A.B. Makhijani & A.J. Lichtenberg, Energy and Well-Being, 14 ENVIRONMENT 14 (June 1972); J.C. BRAVARD, H.B. FLORA II & C. PORTAL, ENERGY EXPENDITURES ASSOCIATED WITH THE PRODUCTION AND RECYCLE OF METALS 18 (ORNL-NSF-EP-24, Oak Ridge National Laboratory, 1972) [hereinafter cited as BRAVARD, FLORA & PORTAL]; BERRY, FELS, & MAKINO, *supra*, note 35, at 508; Industrial Sales Promotion Comm., American Gas Ass'n, A STUDY OF PROCESS ENERGY REQUIREMENTS FOR U.S. INDUSTRIES (undated) [hereinafter cited as PROCESS ENERGY REQUIREMENTS FOR U.S. INDUSTRIES]; A.B. Makhijani & A.J. Lichtenberg, *An Assessment of Energy and Materials Utilization in the U.S.A.*, paper presented to the Dep't of EECS, Univ. of Cal. at Berkeley, Seminar on the Ecology of Power Production (1971); H. MAKINO & R.S. BERRY, CONSUMER GOODS: A THERMODYNAMIC ANALYSIS OF PACKAGING, TRANSPORT AND STORAGE (Illinois Institute for Environmental Quality, June 1973); D.J. Wright, *Goods and Services: An Input/Output Analysis*, 2 ENERGY POLICY 307 (Dec. 1974); P.F. Chapman, *The Energy Costs of Materials*, 3 ENERGY POLICY 47 (March 1975); R.S. Berry, T.U. Long & H. Makino, *An International Comparison of Polymers and Their Alternatives*, 3 ENERGY POLICY 144 (June 1975).

A number of writers have also tried to roughly quantify the environmental as well as the energy impact of materials consumption. See, C.W. Dane, *The Hidden Environmental Costs of Alternative*

Materials Available for Construction, J. OF FORESTRY, 734-36 (Dec. 1972), reprinted in *Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs, National Materials Policy*, 93rd Cong., 1st sess: 235-37 (Oct.-Nov. 1973); A. MacKillop, *Low Energy Housing*, 2 ECOLOGIST, Dec. 1972, at 8 [hereinafter cited as MacKillop]; P. Kakela, *Railroading Scrap*, 17 ENVIRONMENT, March 1975, at 27-33. For data indicating how these energy demands might be reduced, see R.R. GATTS, R.G. MASSEY & J.C. ROBERTSON, ENERGY CONSERVATION PROGRAM GUIDE FOR INDUSTRY AND COMMERCE (EPIC) (Nat'l Bureau of Standards, Dep't of Commerce, NBS Handbook 115, 1974); SUB-COUNCIL ON TECHNOLOGY, NAT'L INDUSTRIAL ENERGY CONSERVATION COUNCIL, DEP'T OF COMMERCE, HOW TO PROFIT BY CONSERVING ENERGY: A DO-IT-YOURSELF KIT (1974). Even for a given factory, the amount of energy used per ton of output may vary with weather conditions, capacity utilization and other factors. See OFFICE OF INDUSTRIAL PROGRAMS, CONSERVATION AND ENVIRONMENT, FEDERAL ENERGY AD., INDUSTRIAL ENERGY CONSERVATION: ENERGY EFFICIENCY REPORT FACT SHEET (FEA, June 1975).

¹⁰ BULLARD & HERENDEEN, *supra*, note 34.

¹¹ This factor is ignored by many geographers. See D.B. Luten, *The Economic Geography of Energy*, 224 SCIENTIFIC AMERICAN 164, (Sept. 1971).

¹² *West Side Highway Transportation Analysis supra*, note 71.

¹³ P.J. CLAFFEY, RUNNING COSTS OF MOTOR VEHICLES AS AFFECTED BY ROAD DESIGN AND TRAFFIC, Highway Research Board, National Research Council, National Academy of Science—National Cooperative Highway Research Program Report No. 111 (1971). See also E.M. COPE, THE EFFECT OF SPEED ON AUTOMOBILE GASOLINE CONSUMPTION RATES (Dep't of Transportation, Oct. 1973); ENVIRONMENTAL PROTECTION AGENCY, A REPORT ON AUTOMOTIVE FUEL ECONOMY (1974).

Other useful data on the energy consumption of various transportation modes, and the effect of speed, may be found in E.M. COPE, THE EFFECT OF SPEED ON TRUCK FUEL CONSUMPTION RATES (Dep't of Transportation, Aug. 1974); A. FRENCH & H. BISHOP, ANALYSIS OF FUEL SAVING THROUGH REDUCED SPEED LIMITS (Dept. of Transportation, Dec. 1973, rev. April 1974); R.A. Rice, *System Energy and Future Transportation*, TECHNOLOGY REV., Jan. 1972, at 31-37; R.A. Rice, *Toward More Transportation with Less Energy*, TECHNOLOGY REV., Feb., 1974, at 45-53.

¹⁴ E. HIRST, DIRECT AND INDIRECT ENERGY REQUIREMENTS FOR

AUTOMOBILES 13, 16 (ORNL-NSF-EP-64, Oak Ridge National Laboratory, 1974). To avoid double counting, the 3400 figure excludes energy consumption in highway construction.

⁴⁵ *Id.* As with the energy cost of materials, there are varying estimates of the total energy cost of automobile manufacture. See also BERRY, FELS & MAKINO *supra*, note 35; Peter Chapman, *No Overdrafts in the Energy Economy*, 59 NEW SCIENTIST 410 (May 17, 1973); D.K. Samples, Product Planning and Development Office, Chrysler Corp., *Energy in the Automobile*, paper presented to the annual meeting of the Scientists Institute for Public Information, (April 19, 1975); R.S. BERRY & M.F. FELS, THE PRODUCTION AND CONSUMPTION OF AUTOMOBILES: AN ENERGY ANALYSIS OF THE MANUFACTURE, DISCARD AND REUSE OF THE AUTOMOBILE AND ITS COMPONENT MATERIALS (Illinois Institute for Environmental Quality, July 1972); G. LEACH, *The Motor Car and Natural Resources*, Vol. 4 of INQUIRY INTO THE IMPACT OF THE MOTOR CAR ON THE ENVIRONMENT (Environment Directorate, Organisation for Economic Co-operation and Development, 1973); J.K. Tien, *et al.*, *Reducing the Energy Investment in Automobiles*, 77 TECHNOLOGY REV., Feb., 1975, at 39.

⁴⁶ It was necessary to calculate the B.t.u. content of truck fuel. In the New York region, at least 90% of the trucks have gasoline engines. John C. Cosby, Wilbur Smith & Associates, *Heavy Duty Vehicle Driving Pattern And Use Survey, Final Report, Part I, New York City* 20, prepared for Environmental Protection Agency and Coordinating Research Council, Inc. (APT.D-1523, May 1973). Since diesel fuel has an energy content of 140,800 B.t.u./gallon and gasoline has a content of 124,900 B.t.u./gallon, a weighted average of 126,000 B.t.u./gallon was obtained. This is not an exact method of calculating the B.t.u. content, but it appears to yield reasonably reliable numbers. Then the same procedure was followed as for autos to calculate direct and indirect fuel consumption by trucks. Based on the average automobile fuel mileage of 2.4 times that of trucks, 8160 was used as the multiplier for other indirect energy demands for trucks (for manufacture, etc.). A detailed examination of truck indirect energy consumption, such as that which Hirst performed for automobiles, was not available to determine a more exact multiplier. Some of the same objections to the 3400 automobile coefficient may be raised against the 8160 truck coefficient. The same answers would apply, except that the number of trucks in service is probably more closely related to the available highway facilities than is the number of cars in service, due to the impact of highways on business location decisions.

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⁸⁷ See R.A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK*, 515-18, 897-900, 911-12 (Knopf, 1974).

⁸⁸ See note 83, *supra*.

⁸⁹ T.J. HEALY & D.T. DICK, *TOTAL ENERGY REQUIREMENTS OF THE BAY AREA RAPID TRANSIT (BART) SYSTEM* (Univ. of Santa Clara, July 1, 1974).

⁹⁰ M.F. FELS, *COMPARATIVE ENERGY COSTS OF URBAN TRANSPORTATION SYSTEMS* (74-TR-2, Transportation Program, Princeton University, 1974).

⁹¹ See generally E. Hirst, *Transportation Energy Use and Conservation Potential*, 29 BULL. ATOMIC SCIENTISTS, Nov. 1973, at 36. For greater detail see E. HIRST, *ENERGY INTENSIVENESS OF PASSENGER AND FREIGHT TRANSPORT MODES, 1950-1970* (ORNL-NSF-EP-44, Oak Ridge Nat'l Laboratory, 1973). See also M.F. Fels and A.L. Kornhauser, *A Comparison Of The Energy And Resources Required In The Manufacturing Of Four Modes Of Urban Transportation*, presented at Ground Transportation Symposium, Santa Clara, California, (May 1973); and M.F. Fels and M. Lion, *A Prescription For The Evaluation Of Transportation Energy In Urban Areas*, presented to Transportation Workshop, (New Jersey) State Planning Task Force (Dec. 3, 1973). Additional data on the operating energy requirements of mass transit systems, as well as other environmental impacts, may be found in DEP'T OF TRANSPORTATION, *BUS RAPID TRANSIT OPTIONS FOR DENSELY DEVELOPED AREAS*, Tables 7 and 13 (Feb. 1975); M. KAMRASS, *Some Air Pollution, Accident, and Noise Factors Due to Mass Transit Systems*, in *ECONOMIC CHARACTERISTICS OF THE URBAN PUBLIC TRANSPORTATION INDUSTRY* (Dep't of Transportation, Feb. 1972); R. HUSTED, *MASS TRANSIT IMPACT ON ENERGY CONSUMPTION*, SOCIETY OF AUTOMOTIVE ENGINEERS PAPER 730521 (1973); J.H. Jennrich, *Comparison of Efficiencies*, HIGHWAY USER QUARTERLY, Summer 1974, at 11.

⁹² R.A. Rice, *supra*, note 83. For a discussion of the energy impact of the electric car, see D.P. Grimmer & K. Luszczynski, *Lost Power*, 14 ENVIRONMENT, April 1972, at 20.

⁹³ M. GERRARD, *TRANSPORTATION POLICY AND THE NEW YORK ENVIRONMENT*, COUNCIL ON THE ENVIRONMENT OF NEW YORK CITY (1974); J.R. Pierce, *The Fuel Consumption of Automobiles*, 232 SCIENTIFIC AMERICAN 34 (Jan. 1975); C.E. Cohn, *Improved Fuel Economy for Automobiles*, 77 TECHNOLOGY REV., Feb. 1975, at 45.

⁹⁴ R.S. Berry, *Recycling, Thermodynamics & Environmental Thrift*, 28 BULL. ATOMIC SCIENTISTS, May 1972, at 14.

⁹⁵ One source of data for individuals who wish to calculate their

own energy consumption is contained in A.J. FRITSCH, *THE CONTRASUMERS: A CITIZEN'S GUIDE TO RESOURCE CONSERVATION* 159-79 (Praeger, 1974). Somewhat more detail may be found in A.J. FRITSCH & B.I. CASTLEMAN, *LIFESTYLE INDEX* (Washington, Center for Science in the Public Interest, 1974).

⁹⁶ For an interesting theoretical discussion of achieving no-growth, steady-state cities, see H.T. Odum & L.L. Peterson, *Relationship of Energy and Complexity in Planning*, 42 *ARCHITECTURAL DESIGN* 624-29 (Oct. 1972).

⁹⁷ REGIONAL ENERGY CONSUMPTION, *supra*, note 71, at 6, 7. Bruce Hannon of the Center for Advanced Computation maintains, however, that when all indirect energy inputs are considered, New Yorkers consume approximately 23% more per capita than the national average. Unpublished letter, B. Hannon to *Washington Post*, Dec. 31, 1973; and B. HANNON, *ENERGY CONSERVATION AND THE CONSUMER* 10 (Center for Advanced Computation, Oct. 1974). More data on the impact of density on transportation energy consumption may be found in J.M. LUTIN, *COMPARISON OF ENERGY SAVINGS FOR WORK TRIPS, AN ANALYSIS OF ALTERNATIVE COMMUTING PATTERNS FOR NEW JERSEY* (#741TP116, Transportation Program, Princeton Univ., Aug. 1974).

⁹⁸ B.C. NETSCHERT & R. WEINSTEIN, *The Impact of Urbanization on the Demand for Energy*, in *URBAN DEMANDS ON NATURAL RESOURCES* 137, proceedings of Western Resources Conference, Denver, Colo., (July 8-10, 1970). See also Real Estate Research Corp., *The Costs of Sprawl: Detailed Cost Analysis*, prepared for Council on Environmental Quality, Dep't of Housing and Urban Development and Environmental Protection Agency (April 1974).

⁹⁹ D.P. MOYNIHAN, *TRAFFIC SAFETY AND THE HEALTH OF THE BODY POLITIC* 6, *MONDAY EVENING PAPERS*, No. 10 (Center for Advanced Studies, Wesleyan Univ., undated).

¹⁰⁰ B. Hannon, *Energy Conservation and the Consumer*, 189 *SCIENCE* 99 (1975).

¹⁰¹ For a general theoretical discussion, see H.T. ODUM, *supra*, note 4.

One consideration worth noting, although beyond the scope of this article, is that the wealthier an individual becomes, the larger a share of his energy budget goes into indirect energy, in the form of airplane trips, larger houses, more clothing, more financial investment, etc. Therefore, attempts to conserve energy solely through more efficient residential or auto use (e.g., better insulation, more car-pooling) will have proportionally less impact on the

rich. Equity, then, as well as the need to conserve fuel, dictates the need for controls over both indirect and direct energy demands.

¹⁰² E. HIRST, ENERGY USE FOR FOOD IN THE UNITED STATES 11 (ORNL-EP-NSF-57, Oak Ridge Nat'l Laboratory, 1973). See also J.S. Steinhart and C.E. Steinhart, *Energy Use in the U.S. Food System*, 184 SCIENCE 307 (1974); D. Pimenthal, et al., *Food Production and the Energy Crisis*, 182 SCIENCE 443 (Nov. 2, 1973); R.A. HERENDEEN, *Use of Input-Output Analysis to Determine the Energy Costs of Goods and Services*, in ENERGY: DEMAND, CONSERVATION, AND INSTITUTIONAL PROBLEMS 152 (M.S. Macrakis ed. 1974); B. Pain and R. Phipps, *The Energy to Grow Maize*, 66 NEW SCIENTIST 394 (May 15, 1975); V.W. Ruttan, *Food Production and the Energy Crisis*, 187 SCIENCE 560 (1975); G. LEACH, ENERGY AND FOOD PRODUCTION (London, International Institute for Environment and Development, 1975); and W. LOCKERETZC, et al., A COMPARISON OF THE PRODUCTION, ECONOMIC RETURNS AND ENERGY INTENSIVENESS OF CORN BELT FARMS THAT DO AND DO NOT USE INORGANIC FERTILIZERS AND PESTICIDES, Center for the Biology of Natural Systems, Washington Univ. (July 1975).

¹⁰³ E. Hirst, *Today's Oil Shortage is Tomorrow's Food Crisis*, ENVIRONMENTAL ACTION, Dec. 8, 1973.

¹⁰⁴ W. Clark, *U.S. Agriculture is Growing Trouble as Well as Crops*, 5 SMITHSONIAN, Jan. 1975, at 60.

¹⁰⁵ E. Flattau and J. Stansbury, *It Takes Energy to Produce Energy: The Net's the Thing*, 120 CONG. REC. E1263 (daily ed., March 8, 1974).

¹⁰⁶ Lester Brown of the Overseas Development Council has estimated that if America cut back its meat consumption just 10%, grain now eaten by animals could feed 60 million people. B. Rensberger, *Curb on U.S. Waste Urged to Help World's Hungry*, New York Times, Oct. 25, 1974, at 1.

¹⁰⁷ Energy analysis has shown that cheese represents a far more efficient way of supplying protein than does meat, although it is less efficient than grain. B. Hannon, *Options for Energy Conservation*, TECHNOLOGY REV., Feb. 1974, at 29.

¹⁰⁸ In fact, the researchers for the Environmental Impact Assessment Project and for the Council on the Environment of New York City were totally unaware of each others' work until both analyses had been completed.

¹⁰⁹ A SCIENTIFIC AND POLICY REVIEW OF THE FINAL ENVIRONMENTAL STATEMENT FOR THE INITIAL STATE, GARRISON DIVERSION UNIT (NORTH DAKOTA) 21, Environmental Impact Assessment Project (Gary L.

Pearson, et al., eds. Institute of Ecology, 1975).

¹¹⁰ NAT'L BUREAU OF STANDARDS, DEP'T OF COMMERCE, TECHNICAL OPTIONS FOR ENERGY CONSERVATION IN BUILDINGS 118, NBS Technical Note No. 789 (1973); GENERAL ACCOUNTING OFFICE, HOW FEDERAL AGENCIES CAN CONSERVE UTILITIES AND REDUCE THEIR COST: GENERAL SERVICES ADMINISTRATION, DEPARTMENT OF DEFENSE 15-16 (B-178205, 1974).

¹¹¹ R.G. Stein, *Architecture and Energy* 2-3, paper presented at American Ass'n for the Advancement of Science Convention, Philadelphia (Dec. 29, 1971) [hereinafter cited as Stein]; *Hearings on H.R. 11299 and H.R. 11565 Before the Subcomm. on Energy of the House Comm. on Public Works*, 93rd Cong., 1st Sess., ser. 93-27, at 9 (1973); C.A. Berg, *Energy Conservation Through Effective Utilization*, 181 SCIENCE 128 (July 13, 1973); W. KORONAKES, *Energy Conservation in Building Construction and Lighting in ENERGY CONSERVATION HIGH DENSITY URBAN AREAS: A STUDY OF THE ENERGY CRISIS IN METROPOLITAN NEW YORK CITY* 29. (R.T. Taussig, ed., School of Engineering and Applied Science, Columbia Univ., 1974); HIDDEN WASTE: POTENTIALS FOR ENERGY CONSERVATION 42 (D.B. Large, ed., The Conservation Foundation, 1973). Cf. D.J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 190 (Vintage, 1973).

¹¹² ENERGY FACTS, *supra*, note 42, at 79-83.

¹¹³ Stein, *supra*, note 111, at 3; M.R. SEIDEL, S.E. PLOTKIN & R.O. RECK, *ENERGY CONSERVATION STRATEGIES* 81 (EPA-R5-73-021, Office of Research and Monitoring, Environmental Protection Agency, 1973).

¹¹⁴ Whether this is the case for cars is in question, because of the greater weight that would result from the substitution. The aluminum industry, in fact, maintains that aluminum is an overall energy saver. See statement of E.A. Walker in the *Hearings Before The Subcomm. of the House Comm. on Government Operations and House Comm. on Science and Astronautics*, 93rd Cong., 1st sess., pt. 4, at 1556-94 (1973).

¹¹⁵ W.F. MORSE & E.G. MILLS, *A Study of Process Energy Requirements in the Cement and Lime Industry*, in *PROCESS ENERGY REQUIREMENTS FOR U.S. INDUSTRIES*, *supra*, note 79, at 7.

¹¹⁶ MacKillop, *supra*, note 79, at 4.

¹¹⁷ E. Hirst, *The Energy Cost of Pollution Control*, 15 ENVIRONMENT 41 (Oct. 1973) [hereinafter cited as *Energy Cost*]. This calculation does not include collection, separation and transportation of the material.

¹¹⁸ BRAVARD, FLORA & PORTAL, *supra*, note 79, at 1.

¹¹⁹ J.T. PETERSON, *THE CLIMATE OF CITIES: A SURVEY OF RECENT LITERATURE* 1, No. AP-59 (Nat'l Air Pollution Control Ad., Public Health Service, Dep't of Health, Education & Welfare, Oct. 1969). See also J.T. Peterson, *Energy and the Weather*, 15 ENVIRONMENT 4 (Oct. 1973).

¹²⁰ TVA NEWS, *Home Fireplace May Cost Energy*, Tennessee Valley Authority press release (December 25, 1974).

¹²¹ W. Clark, *It Takes Energy to Get Energy; the Law of Diminishing Returns is in Effect*, 5 SMITHSONIAN 84 (Dec. 1974).

¹²² HUGHES, DICKSON & SCHMIDT, *supra*, note 63, at 82.

¹²³ Cf. E. Carlson, *The Link Between Metals Availability and the Energy Crisis*, 3 ENV. AFF. 447 (1974).

¹²⁴ Two estimates of the relative total efficiencies of natural gas and other fuels are, ENERGY AND THE ENVIRONMENT: ELECTRIC POWER, *supra*, note 65, especially the appendices; OFFICE OF ENERGY RESEARCH AND PLANNING, OFFICE OF THE GOVERNOR, STATE OF OREGON, ENERGY STUDY: INTERIM REPORT (July 26, 1974) [hereinafter cited as ENERGY STUDY: INTERIM REPORT]. These two studies use different definitions of energy efficiencies, and should be used with caution.

¹²⁵ CENTER FOR APPLIED ENERGETICS, OFFICE OF THE GOVERNOR, STATE OF OREGON, COSMIC ECONOMICS (March, 1974), reprinted in *Senate Hearings*, *supra*, note 57, pt. III-appendix, at 1240.

¹²⁶ ENERGY STUDY: INTERIM REPORT, *supra*, note 124, at iii. It has been reported in the press that Texaco decided in 1974 not to bid on oil shale leases in Colorado, largely because of net energy calculations. However, Texaco says these reports are inaccurate, and that it is continuing work on oil shale. Letter from Gordon C. Hamilton, Texaco Inc. to the author (July 23, 1975).

¹²⁷ This idea was proposed to the author in a private letter from Dr. Thomas Moss, in the Office of U.S. Rep. George E. Brown, Jr. (Dec. 3, 1974).

¹²⁸ Letter from the Acting Comptroller General of the U.S. to Rep. Pierre DuPont (General Accounting Office No. B-178205, May 28, 1974).

¹²⁹ See P. Chapman, *The Ins and Outs of Nuclear Power*, 64 NEW SCIENTIST 866-69 (Dec. 19, 1974); J. Wright and J. Syrett, *Energy Analysis of Nuclear Power*, 65 NEW SCIENTIST, 66-67 (Jan. 9, 1975); J. PRICE, DYNAMIC ENERGY ANALYSIS AND NUCLEAR POWER, (Friends of the Earth, Dec. 18, 1974); J.W. Moore, et al., *Net Energy*, 16 ENVIRONMENT, Dec., 1974 at 40; M. Resnikoff, *Net Energy*, 17 ENVIRONMENT, March, 1975 at 42; A.B. Lovins, *Nuclear*

Power—Energy Consumer? 17 ENVIRONMENT, June 1975 at 44; W.K. Davis, Bechtel Power Corp., *Nuclear Power's Contribution to Energy Growth*, paper presented at Atomic Industrial Forum Conference on Accelerating Nuclear Power Plant Construction, New Orleans, La. (March 3, 1975).

¹³⁰ C.M. Summers, *The Conversion of Energy*, 224 SCIENTIFIC AMERICAN 149, (Sept. 1971).

¹³¹ The electric utility industry has occasionally tried to conceal this distinction. See advertisement by the Edison Electric Institute, in 227 ATLANTIC, Feb. 1971 at iii. See also *Tennessee Valley Authority Pollution Prevention Facilities—Conference Report*, 120 Cong. Rec. S20,613 (daily ed., Dec. 4, 1974) (remarks of Sen. Baker).

¹³² S.K. MENCHER, A. HAKKI & M.S. ROLINSKI, *Environmental Impact as a Criterion in Heating System Design*, 15 ASHRAE HEATING, REFRIGERATION, & AIR CONDITIONING J., Feb. 1973, at 37-39. [hereinafter cited as MENCHER, HAKKI & ROLINSKI]. Another study found that in the New York region (but not counting energy used outside the region), fuel oil heating had a system efficiency of 0.627; electricity, 0.379; natural gas, 0.723; and steam, 0.60. H.G.M. JONES, P.F. PALMEDO & R. NATHANS, *ENERGY SUPPLY AND DEMAND IN THE NEW YORK CITY REGION: AN ANALYTICAL FRAMEWORK FOR REGIONAL ENERGY SYSTEMS ANALYSIS* 54 (BNL 19493, Energy Policy Analysis Group, Brookhaven Nat'l Laboratory, 1974). A third study, including all energy inputs from inside and outside Long Island, found it would take 25.36% more energy to provide home space and water heating on the island by electricity than by gas. Nat'l Econ. Research Associates, *Electric Heating Versus Oil Heating In The Service Territory of Long Island Lighting Company: An Analysis of the Comparative Efficiency of Energy and Energy Resource Use and the Comparative Impact on the Use of Scarce or Exhaustible Energy Resources*, Vol. 1, at Table C-43, prepared for Long Island Lighting Company (Oct. 1973). It might be interesting to investigate whether energy efficiency might play a role in electric utility rate design.

¹³³ MENCHER, HAKKI & ROLINSKI, *supra*, note 132.

¹³⁴ H.T. Odum, *Energy, Ecology, and Economics*, 143 INDUSTRIAL DEVELOPMENT 17 (Jan./Feb. 1974).

¹³⁵ HUGHES, DICKSON & SCHMIDT, *supra*, note 63, at 83.

¹³⁶ *Id.* at 79.

¹³⁷ *Id.* at 81.

¹³⁸ For an interesting theoretical discussion of this general idea, see N. GEORGESCU-ROEGEN, *THE ENTROPY LAW AND THE ECONOMIC PROCESS* (Harvard University Press, 1971).

¹³⁸ See, e.g., A TECHNICAL BASIS FOR ENERGY CONSERVATION, *supra*, note 37, at 3.

¹⁴⁰ *Energy Cost*, *supra*, note 117, at 37. For more detail, see E. HIRST, ENERGY IMPLICATIONS OF SEVERAL ENVIRONMENTAL QUALITY STRATEGIES (ORNL-NSF-EP-53, Oak Ridge National Laboratory, 1973). Cf. *Energy Resources Council Memorandum on Extending Automobile Emission Standards*, 7 BNA ENV. REP. 428 (July 4, 1975); and FEDERAL ENERGY AD., ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974, SECTION 2, COAL CONVERSION PROGRAM—FINAL ENVIRONMENTAL STATEMENT, (FES 75-1, April 1975).

¹⁴¹ A.B. Lovins, *On Total Energy Costs*, 5 ECO, July 8, 1974 at 5.

¹⁴² See generally A. Teller, *Air-Pollution Abatement: Economic Rationality and Reality*, 96 DAEDALUS 1082-98, (Fall 1967).

¹⁴³ DEP'T OF TRANSPORTATION: NEWS, Federal Highway Administration Press Release (April 3, 1975).

¹⁴⁴ See ENERGY AND THE ENVIRONMENT: ELECTRIC POWER, *supra*, note 65, at 27.

¹⁴⁵ A TECHNICAL BASIS FOR ENERGY CONSERVATION, *supra*, note 37, at 14.

¹⁴⁶ FEDERAL ENERGY NEWS, *FEA Authorizes \$1.2 Million For Electric Utility Efficiency Demonstration Projects*, Federal Energy Administration press release (April 30, 1975).

¹⁴⁷ OFFICE OF EMERGENCY PREPAREDNESS, EXECUTIVE OFFICE OF THE PRESIDENT, THE POTENTIAL FOR ENERGY CONSERVATION, B-1 to B-8 (1972).

¹⁴⁸ I. Hoch, *Urban Scale and Environmental Quality*, in POPULATION, RESOURCES, AND THE ENVIRONMENT, *supra*, note 59, at 264.

¹⁴⁹ See A.J. Carnay, *State-of-the-Art Briefing on Solid Waste Management and Energy*, 120 CONG. REC. S3985 (daily ed., March 20, 1974); *Refuse Power: Utilities Study a New Source of Energy*, RESOURCE RECOVERY, 6-9 (Jan./Feb./Mar. 1974).

¹⁵⁰ I. Walter and S.P. Maltezos, *Resource Recovery and U.S. International Trade: The Case of Waste Oil*, 3 ENV. AFF. 433 (1974).

¹⁵¹ B.M. Hannon, *Bottles, Cans and Energy*, 14 ENVIRONMENT 11, 20 (March 1972). See also note 67.

¹⁵² BERRY, FELS & MAKINO, *supra*, note 35, at 513.

¹⁵³ R.S. BERRY & H. MAKINO, *Energy Thrift in Packaging and Marketing*, TECHNOLOGY REV., Feb. 1973, at 40.

¹⁵⁴ STATE OF OREGON, *Energy And State Government: A Decision-Making System Designed to Integrate Social, Economic, and Environmental Processes*, (July 1, 1973) in *Senate Hearings*, *supra*, note

57, at 1067, pt. 3-Appendix at 1076. See also, H.T. ODUM, *Use of Energy Diagrams for Environmental Impact Statements*, TOOLS FOR COASTAL MANAGEMENT 197 (Proceedings of the Conference of Marine Technology Society, 1972). Cf. B.M. Hannon, *An Energy Standard of Value*, 410 ANNALS AM. ACAD. POL. AND SOCIAL SCI. 139 (Nov. 1973), and D.B. HACK, A CONCEPT FOR RESEARCH IN THE SUBJECT OF NET ENERGY: WHAT THE NATIONAL SCIENCE FOUNDATION AND OTHER AGENCIES CAN DO IN FISCAL YEAR 1975 (Draft, Congressional Research Service, Library of Congress, June 17, 1974).

¹⁵⁵ Devising new subjects for impact statements seems to have become a major exercise in recent years. Among the new varieties that have been proposed are:

- (1) Antitrust or competitive impact statements. See, *EPA Encouraged to Coordinate, Assess Antitrust Effects of Regulatory Action*, 4 BNA ENV. REP. 926-27 (Oct. 12, 1973); F.M. Rowe, *Antitrust Policies and Environmental Controls*, 29 THE BUSINESS LAWYER 897,910 (April 1974).
- (2) Economic or inflation impact statements. See, R.W. Rann, *The Need for Economic Impact Statements*, 120 CONG. REC. E2616-17 (daily ed. April 30, 1974); S. 15, *A bill to amend the Congressional Budget Act of 1974 to require the Congressional Budget Office to prepare inflationary impact statements in connection with legislation reported by Senate and House Committees*, 121 CONG. REC. S95 (daily ed. Jan. 15, 1975); Washington Post, March 5, 1975, § A, at 14.
- (3) "Grandchild Impact Statements," assessing the long-term impacts of proposed actions. See N.B. Mack, *Grandchild-Rights Amendment*, in the *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93rd Cong., 1st sess., ser. 9C-29, pt. 3-Appendix at 2204-07 (May 1, 1973).
- (4) "Reverse Impact Statements," showing what will happen to prospective tenants of low-income housing, for example, if a project is not built. See P. MARCUSE, *Conservation for Whom?* in ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA 19 (J.N. Smith ed., Conservation Foundation, 1974).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CAPITAL REGION CITIZENS COMMITTEE, et al.,	:	
	:	Civil Action
Plaintiffs,	:	File No.
	:	72-CV-254
-against-	:	
JOHN A. VOLPE, Secretary of Transportation	:	AFFIRMATION -
of the United States, et al.,	:	RAIL
	:	<u>ALTERNATIVES</u>
Defendants.	:	

-----X

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

CHARLES HASTINGTON affirms, deposes and says as follows:

That he is a member of the Steering Committee of the New York State Transportation Council and also of the Northeast Transportation Coalition, with which plaintiff Capital Region Citizens Committee and others are affiliated, has served in a consulting capacity to those and other organizations in the field of transportation, and makes this affirmation with regard to the failure, as alleged, of defendants to have complied with the National Environmental Policy Act, with regard to the required consideration of alternatives.

The New York State Environmental Action Plan of the New York State Department of Environmental Conservation, insofar as here applicable, provides in part as follows (page 8.1, et seq.):

"New York State's Environmental Action Plan describes the process to be used by the Department of Transportation in developing federally aided transportation plans and pro-

jects to assure full consideration of socioeconomic and environmental factors in making transportation decisions and to ensure that such decisions are made in the best overall public interest. Its objectives * * * are * * *:

* * *

"to give appropriate consideration to reasonable alternatives including alternative modes and the alternative of not building the project.

* * *

(page S.4)

"The Department will initiate the following actions for federally-aided projects for which it has total or partial implementation responsibility:

* * *

(page S.5)

"implement the process as described in this Action Plan to:

"encourage parallel evaluation of all reasonable modal alternatives (transportation)."

* * *

On information and belief, and notwithstanding the requirements of the National Environmental Policy Act of 1969 and related requirements of Federal law, defendants have failed to comply therewith in terms of failure to have considered alternatives to the proposed action and, in particular, the impact of a limited access highway between Binghamton and the Capital Region, as proposed, upon the existing rail line of the Delaware & Hudson Railway between those service areas. As reported in the impact

statement (p. CS-4), the Delaware and Hudson Railway Company is the only major railroad serving this corridor, and provides freight service only, rail passenger service in the corridor having been discontinued. This rail link is a bridge route linking New England and Eastern Canada with the South and West. Approximately 60% of the Delaware & Hudson's rail business is such bridge traffic. The major part of the remaining traffic either originates on or is destined to another railroad. The mainline of the Delaware & Hudson, thus described, between Binghamton and Albany lies almost entirely within the I-88 Corridor. The facilities generally consist of a single track system interconnecting the Erie Lackawanna Railroad in Binghamton and at Ninevah, approximately 24 miles east of Binghamton via a Delaware & Hudson spur at Lanesboro in Pennsylvania. The track between Binghamton and Albany is in fair condition, capable of freight service up to 40 mph, but reportedly not adequate for the 60 mph speeds usually required for passenger service. At present six or seven through freight trains operate daily in each direction between Binghamton and the Capital District. In addition, there is local freight service for customers located along this route. The Railroad's single most important commodity is paper products; however, its traffic includes a wide variety of general freight and such specific items as lumber, grain and feed, electrical supplies and parts for turbines and generators, cement, building supplies, farm machinery and furniture, to mention some.

The Delaware & Hudson Railway has another distinction in New York, and indeed in the Northeast: Surrounded by bankrupt railroads, it is one of the few remaining profitable rail-

roads in the Northeast, and has undertaken, by reason of its continuing - but not forever - profitability, additional regional carrier responsibilities in the Northeast.

The railroad, which as of 1974 had 2,000 employees, 110 locomotives, and 5,312 freight cars, operated on 717 miles of track in central and eastern New York and in Pennsylvania and Vermont. It connected with the Boston & Maine Railroad at Mechanicville, New York, with the Erie-Lackawanna Railroad, as already noted, at Binghamton, and with the former Penn Central Railroad at Wilkes-Barre, Pennsylvania.

All of this, however, can be seriously changed for the worse by the construction, as planned, of a four-lane, limited access truck route between the Binghamton and Capital Region areas as a truck link bridge route linking New England and Eastern Canada with the South and West, a Federally-subsidized truck route in direct competition with the Delaware & Hudson. This is not considered in the impact statements and, unwittingly or by design, a familiar scenario is about to be enacted, one that has taken place, and is taking place all over the United States and in New York itself to the destruction of our rail systems: An Interstate Highway, with 90-10 Federal funding, is constructed in a corridor for the benefit of trucks; existing rail service in the corridor, faced with such heavily-subsidized competition, is forced into bankruptcy; and the advantages of intermodal service, particularly rail freight and passenger service, is lost in the corridor.

This is a matter of common experience in New York and in the Northeast, where all of the major railroads have now gone through bankruptcy and their remains, a somewhat skeletal system,

have been undertaken for operation by Conrail.

The failure of the project sponsor, in its various impact statements, to have considered this aspect of its proposed construction, or modal alternatives thereto, including rail freight and passenger alternatives as part of a multi-modal transportation plan, is reflected in other aspects of the State's transportation program, based on what has been termed its approved statewide "Master Plan for Transportation", a plan which has emphasized the building of new highways, such as the proposed I-88, without adequate consideration of the needs for rail service, both freight and passenger. An excerpt from a Critique of the New York State Rail Plan, by the New York State Transportation Council, relating to these deficiencies in planning, is incorporated by reference with particular applicability to the instant project and the alleged failure of defendants adequately to have considered and reported on the impact of a limited access highway between Binghamton and the Capital Region, as proposed, upon the existing rail line of the Delaware & Hudson Railway between those service areas, and in the larger region which the Railway currently serves and which the proposed new highway would affect.

Charles Masterton

Charles Masterton

Affirmed to before me this

day of June, 1976.

Thomas P. Sullivan

Notary Public

CONSENT TO JUDICIAL
Notary Public
New York
County
JULIAN P. SULLIVAN
Notary Public State of New York
No. 0000000000
Qualified in Westchester County
Commission Expires March 31, 1977

New York State Transportation Council ^A 412

P.O. Box 74, Bellevue Station
Schenectady, N.Y. 12306

C R I T I Q U E

The New York State Rail Plan ---A PLAN DESIGNED TO FAIL 1976

Like the U.S. Railway Association Plan and the U.S. Department of Transportation Report before that, The State Department of Transportation (NYS/DOT) Rail Plan is a Plan to Fail.

Without foundation, lacking adequate analysis of social factors, completely without concern for future needs or recognition of future potential, the State Rail Plan (SRP) is no more than an ad hoc and servile response to the U.S. DOT and U.S.R.A. program to fossilize rail service in the Northeast as the worst of any developed country in the world.

STATE-WIDE MASTER PLAN FOR TRANSPORTATION: BASIS FOR STATE RAIL PLAN

According to an introductory statement in the New York State Rail Plan, "The basic framework of goals and objectives for rail transportation in New York State is set forth in the Department's approved State-wide Master Plan for Transportation". This is one believable statement for the Master Plan itself was considered as merely a permissive acquiescence to a cancerous overgrowth of highway transportation and an equally destructive atrophy of rail transportation. Therefore, no Plan at all; and was widely and emphatically denounced for its emphasis on highways.

Comments by Citizens for Sound Planning, P.O. Box 634, Rye, New York, were particularly pointed: "NYS/DOT emphasis on the motor vehicle as the primary transportation mode is increasing, not decreasing; that is, the transportation imbalance and the Department's failure to fulfill responsibility are growing worse, not better; and, further, the Department specifically forecasts and projects its failure into the next twenty years." and

"For DOT to write blandly about coordination with the Health and Environmental Conservation Departments is naive, when the chief activity of DOT is highway construction and maintenance for motor vehicles, and motor vehicles are the chief source of air and noise pollution. The surest way to antagonize an already-antagonized public is for DOT to express pious concern for health and environment, while at the same time building ever more highways to foster disease and environmental degradation. The end result of the DOT's 'accomplished and sophisticated planning efforts' is pollution. DOT may think that accomplishing pollution is sophisticated, but a sophisticated New York State public does not." July 2, 1973.

This was the tenor of many complaints about the State DOT Master Plan. With such a shoddy basis, there is little wonder that the State Rail Plan fails so completely to accomplish what is needed.

Exhibit -
New York State Transportation Council
Rail Planning

WHAT A GOOD PLAN SHOULD DO: There should be

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- 1) A survey and compilation of the volume and kind of freight that is transported to and from New York's numerous communities; and through New York State to other destinations;
- 2) Analysis of the kind of transportation (mode) by which it is carried;
- 3) Determination as to which mode is the most economical and otherwise advantageous for each of the various main categories of freight.

From this background, a policy should be developed for increasing transportation by the most advantageous mode and decreasing shipping by the least advantageous mode. Such a study and policy would be good planning in the public interest. But, this we have not!

WHAT THE STATE RAIL PLAN DOES NOT DO: SOME SPECIFICS

The NYS/DOT Plan fails to meet the U.S. Federal Railroad Administration (FRA) regulations issued 1-28-75 which specify that state rail plans should "provide for the development of a coordinated and balanced transportation system within the State" (Sec. 255.9) It fails at least in these obvious respects:

1. No Public Input Allowed: This pseudo-plan is utterly lacking in public input which any sound plan should have. The Preliminary State Plan went to FRA on December 8, ten days before NYS/DOT public hearings were held on December 18, 1975. There had been no opportunity for public input in the State Plan prior to sending the Plan to Washington. On the contrary, efforts on the part of citizen groups, freight users and regional development officials to organize a state-wide council for better communication between DOT and the public were discouraged on the basis that, "it would be confusing for our Congressional delegation to be hearing from two voices... and NYS/DOT's voice should be the only one..." !!!
2. There is no analysis of the various transportation modes serving localities or studies as to which mode is most economical and advantageous. Therefore, no policy to stimulate transportation by whatever mode is best suited to a particular situation.
3. No study of what mixture of the several kinds of rail freight service is best suited to New York State. See amplification of this point further on.
4. No plan for improvement of intermodal service which, downstate, at least is close to the worst in the nation. More on this later.
5. No adequate or sound evaluation of branch lines as to:
 - a) Figures based on sound accounting as contrasted with ICC and USRA blind formulae for costs and revenues attributable to a branch as presently served or reasonably expectable if sensibly served;
 - b) No calculation of the additional circuitry cost to the remaining stub ends of a branch if a segment is excised from a branch line connected at both ends;
 - c) No calculation of the domino effect of abandoning New York's branch lines, at least one of which is likely by the law of averages to be domino-effect-prone.

I. HOW MUCH TRANSPORTATION?

The first concern of transportation planning is, "How much transportation does New York State need? How much is good to have and to maintain? Overabundance can be as undesirable as shortage; a flood as destructive as a drought. Yet, New York's direction of drift toward highway transportation calls for (in practice if not in word) as many highways as the Federal Highway Administration is willing to pave us over with from their bottomless source of self-generating funds, --whether New York needs all this pavement or not.

Even with the Thruway, the Northway, the Long Island Expressway, the Southern Tier Expressway, I-95, I-684, I-81 and innumerable lesser freeways, NYS/DOT is still not satisfied. It wants the Southern Tier Expressway extended in three branches to terminate at Rochester, Buffalo and Erie in competition with Conrail, Erie-Lackawanna's successor and the Thomas E. Dewey Thruway. It wants a West Side Interstate in Manhattan at a cost of about \$3 billion. It wants the Long Island Expressway enlarged to compete with what little freight traffic is left to the Long Island Railroad. It wants to complete I-88 from Binghamton to Schenectady at the risk of putting the solvent D&H out of business. It wants a freeway parallel to both the Thruway and 9W next to the Hudson River which it is starting with a \$36 million by-pass of Kingston.

NYS/DOT answers the question of "How much transportation?" by saying --in action if not in word, -- "More than enough to devour the other mode." Although New York State already has 2.2 miles of highway and street for every square mile of land, NYS/DOT is requesting \$364 million of our tax funds for highway construction in 1975-6 alone.

II. WHAT MIXTURE OF SEVERAL KINDS OF RAIL FREIGHT SERVICE IS BEST FOR N.Y. STATE?

While NYS/DOT is intellectually aware of the varieties of rail freight service, it has apparently made no exploratory survey of the actuality and potential of the four major categories of rail freight:

- | | |
|--------------------------------------|---------------------------------|
| 1) Siding-to-Siding | 3) Trailer on Flat Car (TOFC) |
| 2) Carloading Rail Freight Forwarder | 4) Container on Flat Car (COFC) |

These categories represent major variations in pick-up, delivery, time in transit, convenience and expense in handling. Each category serves a different, although frequently-overlapping, clientele.

Siding-to-Siding service requires upkeep of a freight siding and is most conducive to high-volume movement of bulky goods. It is also favored by farmers, as they find it more economical and convenient to unload a freight car at a siding as their work schedule permits than to build all-weather roads to their barns for heavy trucks.

Carloading Rail Freight Forwarders pick up many small shipments in one metropolitan area, consolidate them into one freight car and deliver them to many consignees in another metropolitan area. This service is excellent for less-than-carload freight. It is not performed by rail carriers but by separate enterprisers who arrange for truck pick-up and delivery as well as the freight cars for line haul. Wise planning could encourage a vast increase in this haulage, particularly in Greater New York.

Trailer on Flat Car service is inherently capable of carrying most long-haul freight by rail that is now carried by truck. Were this sub-mode used to the fullest, vast quantities of fuel would be saved and the economic benefit to New York would be immense. Full use of this service is stunted by hostile or inhibiting Federal regulations and rate structures, by inability or unwillingness of many rail carriers to cooperate with each other and, in the East-of-Hudson area by lack of a Hudson River rail freight crossing at the point of major traffic convergence --New York City, itself, --with a consequent detour of up to 336 miles for freight from the south and southwest.

Container on Flat Car service requires a flat-bed truck for pick-up and delivery, and placement of the container onto or off the car or truck by crane or forklift, but with line-haul travel by rail. The service is useful in factory-to-ocean freight service. Retail consignees have no use for this sub-mode as the containers must be lifted off the flatbed truck, unloaded on the receiver's premises, and stored there awaiting removal of the empties. Most consignees cannot spare the space for this arrangement even if they have the means to lift the container off the flat-bed truck.

Were containers equipped with tailgates; were they made to fit onto the chassies of delivery trucks in common use and onto flat cars designed to secure standard containers of several sizes; were trains equipped to serve such containers on flat cars at pass-thru sidings in major cities, and arranged for quick and easy on-and-off loading from the side by crane or fork-lift; then this could become the best way of carrying freight in major corridors. Moreover, such containers and trains could be designed for fast movement along the Boswash corridor to and through New York City via the under-dimensional Penn Station passenger train tunnel which is otherwise suitable only for highly-restricted freight movement. All this is child's play for modern technology and industrial organization. Only institutional obstacles stand in the way --most of which are centered in Washington.

It is understood that NYS/DOT cannot compel the Federal government, nationwide interest groups, corporate bodies and the general public to rationalize these issues and to provide optimum rail freight transportation. However, it is State DOT's responsibility and obligation to study the technology, weigh the options, survey the market, enumerate the obstacles, estimate the effort needed to overcome them, and assess the cost-benefits of each sub-mode in order to set quantitative and qualitative goals for each as well as priorities. Until NYS/DOT finds out what mix of rail freight transportation is needed, --in what quantity and what priority, --it does not even know what to ask for. NYS/DOT has not assessed these factors; therefore, it has not even laid the foundation upon which to place its State Rail Plan.

III. DOES NEW YORK STATE'S RAIL SYSTEM MEET OUR NEEDS?

A third prerequisite to the formulation of a comprehensive rail plan for New York State is to ask whether the rail system now serving our state is complete enough to meet our needs and, if not, can we afford the completion? NYS/DOT has not done this.

Twelve million of New York State's population live east of the Hudson River as well as all of New England's thirteen million people. The front door to New York east of the Hudson and to New England is New York City where most of the freight traffic converges. Certainly, the truck traffic converges in the City; and so would the rail traffic if there were the facilities to let more than a trickle pass through.

Except for 50,000 to 60,000 freight cars a year that cross New York Harbor by car-float, no freight cars cross the Hudson River below the Selkirk Bridge (also called the Castleton-Cut-Off) near Albany, which is 140 miles north of New York City. The route for all rail freight to New York City, Long Island and New England from points south and west of New Jersey --that could not more conveniently go by the Water Level Route --is via New York City. Routing via Selkirk for lack of any other alternative means a 336-mile detour over a devious route to Long Island, a 300-mile detour to Manhattan, and a 100-200-mile detour to southern New England communities within 50 miles of the seacoast. See accompanying map.

To highlight the effect of the lack of a Hudson River crossing upon the metropolitan areas east of the river as contrasted with comparable urban areas west of it, the following table lists the population of each zone, the number of inhabitants per freight car shipped or received and the ratio of inhabitants per car. The zone configurations and the statistics quoted come from US/DOT's Report of February 1, 1974, entitled, "Rail Service in the Midwest and Northeast Regions". Carload ratios are derived by dividing population figures by number of freight cars.

EAST OF THE HUDSON ZONES

Zone Number	Rank	Zone & Territory	Population	Carloads Per Year (Thousands)	Per Person Carload Ratio
58	24	New York (N.Y.C., Nassau, Suffolk, Westchester, Rockland Counties)	11,571,333	279	1 for 41
63	150	Bridgeport, Conn. (Greater Bridgeport)	390,122	13	1 for 30
87	122	New Haven, Conn. (New Haven County)	355,613	30	1 for 11.5
27	108	Providence, R.I. (Northeast R.I. and adjoining Massachusetts areas)	912,907	41	1 for 22
44	28	Boston (Greater Boston)	2,753,800	205	1 for 13

WEST OF THE HUDSON ZONES

Zone Number	Rank	Zone & Territory	Population	Carloads Per Year (Thousands)	Per Person Carload Ratio
60	9	Newark (7 N.J. counties)	3,824,616	578	1 for 6.6
66	6	Philadelphia & 3 counties, (Pa. & N.J.)	4,817,914	759	1 for 6.3
87	10	Baltimore & 5 counties, (Md.)	2,070,670	504	1 for 4
90	35	Washington, D.C. & 6 counties, (Md. & Va.)	2,861,123	181	1 for 16
87	62	Richmond & 3 counties, (Va.)	533,416	96	1 for 5.5
6.	Vs.	Upstate N.Y. (N.Y. State excluding NYC & Buffalo-Niagara zones)	5,350,000	660	1 for 8

Note that comparable urban areas west of the Hudson have a ratio of one freight carload for every 6.6 persons or better, except upstate New York with a 1 to 8 ratio --exclusive of the highly-industrialized Buffalo---Niagara area --and Greater Washington, D.C. which is our nation's least industrialized major urban area with a 1 to 16 ratio. It is hard to understand why New York City's zone should not at least surpass the Washington ratio (1 car for 16 persons) and approach Upstate's ratio of 1 to 8. New York City's, Westchester County's and Long Island's combined 11 million people certainly should be able to use a million freight cars a year, and it is amazing that NYS/DOT has never studied the situation to find out why only a quarter of that amount is used. Since New York is the only major city in the U.S. on a big river that does not have a crossing for freight cars, NYS/DOT should ascribe this phenomenon --in the absence of clear, provable reasons to the contrary --to the inaccessibility of New York to freight cars. Similarly, the scarcity of freight cars to and from Bridgeport, New Haven, Providence and Boston areas are ascribable to the same cause.

Since a detour of up to 336 miles and several days in time must cost somebody a great deal (the rail carrier if it pays for the circuitry; the user, if he pays) it is fair to assume that a crossing of the Hudson River for freight cars at New York could pay for itself in user charges, at least in part. The cost of a Brooklyn to Staten Island tunnel, including approaches and rapid transit connections, has been conservatively estimated by Dr. Robert Neibuhr of Adelphi University at \$1.1 billion. A million loaded cars a year at \$100 a car and 400,000 empties at \$40 a car plus expectable rapid transit revenues could pay for the construction and reasonable financing costs within 10 years.

It is not claimed here that the projected savings, cost estimates, level of use, or attractiveness of user charges referred to above are backed up by hard data, for that is yet to be supplied. It is only stated that the need is urgent and great in scope, as will be the savings in filling it, and that the cost estimates are well considered. It is further stated that the job of planners is to estimate our needs and the cost of filling them. NYS/DOT has not even publicly acknowledged the need of a corridor for rail freight that crosses the Hudson River at New York City to serve New York, Long Island and New England without detours in three figure amounts, much less put it into the planning process.

Lack of such a crossing makes New York City the most truck-intensive city in the United States, and trucks are four times as fuel-consuming as freight trains. As fuel prices rise, what New York City consumes will cost even more than that of other cities because New Yorkers will pay for more fuel to transport it.

Whatever the City manufactures will be less competitive with goods made in other cities, because it will cost its manufacturers more to ship their goods to the rest of the United States. New York as a seaport will suffer even more, even if the carfloat is partially restored (as NYS/DOT advocates) to more than the 55,000 cars a year at present, contrasted with 670,000 a year in 1962. Restored or not, car-floating is a slow, clumsy, labor-intensive and costly way to move freight cars, and it can never compete effectively with rail to pier -- the direct way --as is done in Baltimore and Port Newark.

So, New York will pay more for what it consumes and what it ships in manufactured goods as it becomes the nation's least utilized harbor (the New York side, at any rate). New York's people will grow poorer and poorer as Arabs and Texans grow richer and richer on the fuel they sell us which we would not need if our City enjoyed the rail access of Newark, Baltimore and every other major U.S. city. NYS/DOT is apparently unaware or unmoved that more than 11 million of its population is well over half-way cut off from the transportation ties that bind it to the rest of the U.S.; and this handicaps us as much as if Greater New York were a foreign country subjected to a tariff. This is not just bad planning! It is total ignorance of the facts of economic geography upon which any State Rail Plan should be based.

IV. LACK OF PLAN FOR INTERMODAL FACILITIES --ECONOMIC HANDICAP, STATEWIDE.

NYS/DOT has provided no survey of the railroad yard terminal and intermodal facilities needed within and without the State for expanded rail service. Consequences of this lack of concern for future rail service will be felt in every community. In the State's largest city, it can mean that all or key parts of valuable and irreplaceable rail property will be sold off to various developers. Properties slated to be sold in New York City are:

- Manhattan: 30th St. Yards --Ideal for development of intermodal facilities; to be sold for convention center.
60th St. Yards --Needed for dispersal, assembly and holding of traffic on the West Side Freight Line; to be sold for a housing project.
- Bronx: Harlem River Yards-- Right of way through this property is needed for building a 1.1 mile vital connection between the Hudson and New Haven Divisions to be eventually linked by a loop connection to Long Island via Hell Gate Bridge, thereby providing direct, non-stop service from Selkirk Yard to Long Island via the shortest and fastest route.
Oak Point Yards --Useful either for serving expanded produce markets and other commercial use in the Bronx or for intermodal facilities serving the Bronx, Queens and Brooklyn on a considerably expanded, but not lavish, scale, to be sold to N.Y. Daily News, in part; which part?
- Queens: Sunnyside Yards-- Ideal for an intermodal terminal on an expanded scale of service or a freight yard suitable for the number of cars that would be handled if New York were ever to have a Hudson River crossing for freight cars at New York City, or both. Part of this Yard is to be sold to Abraham and Strauss Department Store for a warehouse.

No criticism of the City government is implied in this expression of concern for the loss of rail facilities through lack of planning on the part of State DOT. It is the responsibility of NYS/DOT to plan for the entire state,--to plan for the future, to tell the City what rail property it should keep to avoid being put into an economic straight jacket. As a consequence of NYS/DOT's failure to carry out its function, the City of New York will be virtually unservable by the cheapest mode of transportation and will, itself, become an economic dwarf.

Failure to plan for future rail service will be credited as a prime cause of driving business out of New York State.

The people of New York State will lose hundreds of miles of trackage under State DOT's arrangements for branch lines. "Branch Line" is used as a generic term although never defined. Dead end lines as well as lines connected at both ends with the total rail system are included in the same category for extinction.

Following U.S.R.A.'s pattern, NYS/DOT will create a multiplicity of stubs, still attached to but no longer a circulating part of the U.S. rail network by excising a segment from the middle of each rail line. That service on these stubs will never be satisfactory is a foregone conclusion judging by all historical experience. It is no more feasible to convert a rail system into a series of stub ends than to tie off portions of the human circulatory system and expect it to function normally. For both, the human body and the rail network, a free-flowing looping pattern is essential.

The State Rail Plan tolerates the chopping out of a segment of at least ten double-ended branch lines without any calculation of the added cost of circuitry in serving the stub ends of these lines, or of the chain-reaction set up by loss of these segments. The peril to regional rail service of these effects is explained in "Components of an Alternate Proposal for Calculating Rail Continuing Subsidies" by Craig Thompson, Council on Environment of New York City, May 1, 1974.

The Council on Environment study lists four categories of circuitry costs:

1. Additional fuel expended.
2. Additional time in transit including crew wages and car rental.
3. Additional maintenance costs from increased wear and tear on rolling stock.
4. The opportunity cost of having freight cars take up more time accomplishing the same operation: Inefficient handling of fleet. Freight cars cost up to \$50,000 new; \$20,000 remodelled. These cars could be earning more money if used on non-circuitous lines where delay is not inherent.

Of the chain-reaction or domino effect, Council on Environment reports:

"Should other branches be dependent on an allegedly unprofitable branch for a sizable part of their revenues, the actual abandonment of that branch can throw the other branches into unprofitability as well. These other branches could throw more branches into unprofitability and on and on, ad infinitum. This effect is not one to be casually disregarded as British Rail officials discovered when...they arbitrarily abandoned branches thought to be unprofitable and set off a chain reaction of rail closings that substantially shrank the total system".

Seemingly, NYS/DOT does not understand that each branch line has its own individualized origin/destination pattern. If a branch line's traffic derives almost exclusively from trunk line points, then abandonment, however harmful otherwise, will not trigger a chain reaction. However, if a considerable volume of a branch line's traffic derives from a branch line elsewhere which, itself, is in danger of abandonment, then one abandonment will lead to another and that of both together may lead to a third or more.

Nobody knows which of New York's branch lines are domino-effect prone, as NYS/DOT has not studied the waybills of its branch lines to find out which ones carry considerable traffic generated by branch lines in other states likely to be abandoned, the loss of which will set off a chain reaction involving New York and all the other northeastern states. "Safety-First" does not seem to be one of NYS/DOT's mottoes.

ABANDONMENTS THAT WILL WEAKEN NEW YORK'S RAIL NETWORK AND FORECLOSE A GREAT POTENTIAL FOR FUTURE USE.

NYS/DOT does not seem to understand that a rail network is a web of mutually-supporting strands. Therefore, it does not even try to evaluate the contribution of each double-connected branch line to the strength of the entire system --but only attempts to assess its local contribution in a skimpy, hit-or-miss way.

Reading from west to east is a list of double-ended lines from which a segment will be excised. This is by no means all of the lines slated for abandonment, --just the most obviously-monstrous selections on which vastly-increased costs will arise from the circuitry necessary to serve the remaining stubs. The Cuba Jct.-River Jct line (32 miles) is not included here. This double-connected branch will be abandoned in entirety.

	BRANCH CON- NECTED TO U.S. RAIL NETWORK AT	MILEAGE FOR ENTIRE BRANCH	SEGMENT TO BE EXCISED	MILEAGE OF SEGMENT
1.	Brockton and Corey (Pa.)	40	Brockton -Mayville	10
2.	Dunkirk and Salamanca	47	Dunkirk-Cattaraugus	31
3.	Buffalo and Waterboro	59	Gowanda-South Dayton	11
4.	Suspension Bridge and Charlotte	81	Wilson-Charlotte	65
5.	Charlotte and Oswego	70	Windor Beach-Webster	7
6.	LeRoy/Caledonia and Syracuse	108	Victor-Rochester Jct.	14
7.	Himrod Jct and Elmira	37	Montour Falls-Horseheads	13
8.	Lyons and Sayre (Pa.)	91	Kendalia-Odessa	27
9.	Oswego and West Syracuse (EL)	35	West Oswego-West Fulton	11
10.	Owego and Cortland	44	Freeville-West Cortland	9
11.	Suffern/Sparkhill/Jersey City	40	Nanuet-Orangeburg	5
12.	Chatham and Bronx (Harlem Div.)	122	Ghent-Millerton	31
		774		234

It is not claimed that all of these lines are equally important to the functioning of the Northeast rail network. The burden of our contention is that NYS/DOT has not tried to evaluate their significance to the total system; is willing to ill-serve 540 miles of stub lines in order to tear up 234 miles of track without trying to find out what the line in question does for the whole network.

The State Rail Plan proposes the abandonment of 163 miles of stub-end branch lines and 234 miles of double-connected branch lines. This latter will create 540 miles of stubs that were once servable in two directions. So, NYS/DOT's box score on saving branch lines now stands at:

Lines NYS/DOT Plans to Save	-----	596 miles
Lines NYS/DOT will not save	-----	397 miles
Stubs left after amputation	-----	520 miles
Total Mileage USRA Proposed Not to Retain	-----	993 miles

This can hardly be considered a comendable salvage job. Out of 993 miles the USRA doesn't want, NYS/DOT is saving only 596 miles. In so doing, it amputates parts of 774 miles of double-connected branch lines.

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FURTHER COMMENTS ON SOME PARTICULAR ABANDONMENTS.

Among all the other lines that will be abandoned or stubbed, the loss of these lines are singled out for particular comment for their potential use is so obviously multi-fold in cost/benefit ratio if inexpensively-restored and sensibly-served that they are clearly worth preserving at many times the cost.

1. Rochester Jct. to Victor: Abandonment of this line as well as the Rochester to Oswego line will knock out the only alternate route between Rochester and Syracuse parallel to the Water Level Route, one of our nation's main trunk lines.
2. Catskill Mountain Branch: Severe economic damage to agricultural areas will result from abandonment and loss of a great recreational and potentially-profitable summer excursion line in Ulster and Delaware Counties.
3. Piermont-Suffern and Spring Valley-Theills: This Rockland County complex has a great commuter potential as it is or easily can be connected with rail passenger lines through Hudson River tunnels to Manhattan. The Piermont-Suffern stretch is Rockland County's only east-west line and could become the backbone of a Rockland-northern New Jersey light rail network for commuter traffic and local use.
4. Harlem Division: 31.5 miles, Ghent to Millerton to be excised. If operated as a through line, Selkirk-Chatham-Bronx, these 135 miles would carry 5400 cars a year with 30-car trains three times weekly. Excising a segment of the Harlem line will leave 12 million people living east of the Hudson River in Greater New York dependent on only two rail lines for overland rail freight service.

COMMENTS ON NYS/DOT's ADDENDUM:

In the Addendum on the State Rail Plan, DOT presents an "either-or" solution to the proposal that the Harlem Division be served direct from Selkirk. This is fallacious reasoning and suggests a Divide-and-Conquer technique.

To ask that way freight to and from all points on the Harlem be served direct via Chatham in no way implies that freight to New Haven must be routed over the Harlem as far as Dyckmans, as DOT's Addendum suggests. Although such a proposal may have merit, direct service on the Harlem has no bearing on the best way to route through freight to Danbury and beyond. Since Selkirk-New Haven service over the Harlem is not necessary, the more extensive and expensive improvements to the Harlem described on page 13 of the Addendum will not be needed, and the Hopewell Junction branch will not have to be abandoned.

The Adirondack Division is not considered in this Critique as it was already abandoned before the RRR Act was enacted. NYS/DOT is to be commended for its strenuous and creative efforts to revive this line. Would that such were the rule rather than the exception!

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
CAPITAL REGION CITIZENS COMMITTEE, et al., :

Plaintiffs, :

-against- :

JOHN A. VOLPE, Secretary of Transportation :
of the United States, et al., :

Defendants. :

Civil Action
File No.
72-CV-254

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SCHENECTADY)

DOROTHY L. ROSENTHAL, being duly sworn, deposes and says:

That she is co-chairman of the Capital Region Citizens Committee, one of the plaintiffs herein, and makes this affidavit with reference to the failure of defendants to have complied with the National Environmental Policy Act of 1969 and other applicable Federal statutes and regulations with regard to the required consideration of alternatives to the proposed action and, in particular, in terms of the impact thereof upon the Capital District and rail and public transit alternatives.

On information and belief, there has been a failure to comply, in the planning of alternatives to the proposed highway as it would impact upon said Capital District, with the requirements of Federal law as applicable to the Capital District Regional Planning Commission. Supported by State and Federal Funds, the aforesaid Commission, under Federal regulations, for-

mally reviews, as the designated metropolitan clearinghouse and regional planning agency, projects involving the use of Federal funds, particularly under Section 204 of the Demonstration Cities and Metropolitan Act of 1966 and the Federal-Aid Highway Act of 1962, as amended. Applications for Federal loans or grants to assist in carrying out open space land projects and for the planning and construction of hospitals, airports, libraries, water supply and distribution facilities, sewage facilities and waste treatment works, highways, mass transportation facilities, and water development and land conservation projects are reviewed to assure that they are consistent with the overall comprehensive plan for the region. In the case of highways, under Section 9 of the Federal-Aid Highway Act of 1962, Pub.L. 87-866, 23 U.S.C., Sec. 134, this is mandated in terms of development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of defined urban areas; with the further specific prohibition of approval of such projects unless there is a finding that such projects are based on a continuing comprehensive transportation planning process carried on in conformance with the statutorily stated objectives.

Further, by Title IV of the Intergovernmental Cooperation Act of 1968, 82 Stat. 1103, it is provided in part as follows with regard to coordinated intergovernmental policy and administration of development assistance programs:

"TITLE IV--Coordinated Intergovernmental Policy and Administration of Development Assistance Programs

"Declaration of Development Assistance Policy

"Sec. 401. (a) The economic and social development of

the Nation and the achievement of satisfactory levels of living depend upon the sound and orderly development of all areas, both urban and rural. * * * The President shall, therefore, establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development, including programs providing Federal assistance to the States and localities, to the end that they shall most effectively serve these basic objectives. Such rules and regulations shall provide for full consideration of the concurrent achievement of the following specific objectives and, to the extent authorized by law, reasoned choices shall be made between such objectives when they conflict:

"(1) Appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes;

"(2) Wise development and conservation of natural resources, including land, water, minerals, wildlife, and others;

"(3) Balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods;

"(4) Adequate outdoor recreation and open space;

"(5) Protection of areas of unique natural beauty, historical and scientific interest;

"(6) Properly planned community facilities, including utilities for the supply of power, water, and communications, for the safe disposal of wastes, and for other purposes; and

"(7) Concern for high standards of design

"(b) All viewpoints--national, regional, State, and local--shall, to the extent possible, be fully considered and taken into account in planning Federal or federally assisted development programs and projects. State and local government objectives, together with the objectives of regional organizations shall be considered and evaluated within a framework of national public objectives, as expressed in Federal law, and available projections of future national conditions and needs of regions, State, and localities shall be considered in plan formulation, evaluation, and review.

"(c) To the maximum extent possible, consistent with national objectives, all Federal aid for developmental purposes shall be consistent with and further the objectives of State, regional, and local comprehensive planning. Consideration shall be given to all developmental aspects of our total national community, including but not limited to housing, transportation, economic development, natural and human resources development, community facilities, and the general improvement of living environments.

* * *

"(c) Insofar as possible, systematic planning required by individual Federal programs (such as highway construction, urban renewal, and open space) shall be coordinated with and, to the extent authorized by law, made part of comprehensive local and area-wide development planning.

* * *

"Rules and Regulations

"Sec. 403. The Bureau of the Budget, or such other agency as may be designated by the President, is hereby authorized to prescribe such rules and regulations as are deemed appropriate for the effective administration of this title."

By Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (80 Stat. 1263, 82 Stat. 208), it is provided as follows with regard to the requirement of comprehensive planning in connection with Federal loans and grants:

"Sec. 204. (a) All applications made after June 30, 1967, for Federal loans or grants to assist in carrying out open-space land projects or for planning or construction of hospitals, airports, libraries, water supply and distribution facilities, sewage facilities and waste treatment works, highways, transportation facilities, law enforcement facilities, and water development and land conservation projects within any metropolitan area shall be submitted for review--

"(1) To any areawide agency which is designated to perform metropolitan or regional planning for the area within which the assistance is to be used, and which is, to the greatest practicable extent, composed of or responsible to the elected officials of a unit of areawide government or of the units of general local government within whose jurisdiction such agency is authorized to engage in such planning
* * *

"(b)(1) * * * each application shall be accompanied (A) by the comments and recommendations with respect to the project involved by the areawide agency and governing bodies of the units of general local government to which the application has been submitted for review, and (B) by a statement by the applicant that such comments and recommendations have been considered prior to formal submission of the application. Such comments shall include information concerning the extent to which the project is consistent with comprehensive planning developed or in the process of development for the metropolitan area or the unit of general government, as the case may be, and the extent to which such project contributes to the fulfillment of such planning. * * *

"(3) The requirements * * * shall also apply to any amendment of the application which, in light of the purposes of this title, involves a major change in the project covered by the application prior to such amendment."

* * *

In conformance with the foregoing, and as applicable to the Commission aforesaid, the Director of the Office of Management and Budget promulgated regulations on July 24, 1969, in the form of Circular A-95, in partial implementation of the Intergovernmental Cooperation Act of 1968. A major revision was issued on February 9, 1971, and certain other substantive amendments were promulgated as a separate issuance on March 8, 1972. The current regulations, dated November 13, 1973 (Rev. Circular No. A-95), were promulgated by the Director of the Office of Management and Budget under Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968, aforesaid, and under Section 102(2)(C) of the National Environmental Policy Act of 1969.

On information and belief, the project sponsor has failed to carry out the requisite requirements with regard to the project under the aforesaid statutory authority and regulations issued thereunder; and continues and fails to do so in the performance of its responsibilities under law, including the proposed project itself. The instant motion should be denied pending compliance therewith with particular reference to its integration with other planning functions in the Capital District, including rail and public transit, and on an intermodal basis relating to the District.

DOROTHY L. ROSENTHAL

Dorothy L. Rosenthal

Sworn to before me this

13 day of June, 1976.

JANE H. SPRINGER

 Notary Public

JANE H. SPRINGER
 Notary Public, State of New York
 Qualified in Albany County
 My Commission Expires March 30, 1977

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SAFE TRANSPORTATION-
N. Y. STATE COST, TOWN OF ROTTERDAM, TOWN-OF-PRINCETOWN,
ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERT,
CHESTER and JANE SNYDER, JOHN K. and
MARY E. ALDERSHOFF and GARRETT J. and DELLA M.
ANDERSHOFF, WILLIAM F. and WILMA SCHULIZE,
ARTHUR W. and JANICE SCOTT, ROBERT G. and
MARY LOU SAWYER, and DANIEL T. and DORIS SEIP,

Plaintiffs,

-vs-

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway Administrator
of the Bureau of Public Roads, United States Department
of Transportation;
ROBERT E. KIRBY, Division Engineer of the Bureau of
Public Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department of
Transportation of the State of New York; and,
CHARLES E. CRANSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individually
as well as in his designated official capacity,

Defendants.

CIVIL NO.
72-CV-254

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

WILLIAM A. NOSTRAND, Jr., being duly sworn, deposes and says:

1. I am the Director of the Office of Environment and Design, Region 1, Federal Highway Administration (FHWA), of the United States Department of Transportation. I have held that position since March of 1974. Immediately prior to my present position, I was the Chief of the Location Review Staff in the FHWA Washington Office of Environmental Policy from September, 1971 to March, 1974. In that position I gained a valuable expertise in technical knowledge related to environmental evaluation of the location of highways.

2. Prior to that position I have held various positions in FHWA and the former Bureau of Public Roads since joining the organization in 1959, including the position of District Engineer for the district covering New York State Region Nine.

3. Before my Federal Service, I was employed for eight years by the Consultant Engineering firm of Edwards and Kelcey of Newark, New Jersey.

4. I hold a Bachelor's Degree of Civil Engineering from Syracuse University and have obtained professional engineering licenses in the States of New York, New Jersey and Minnesota.

5. During my employment with FHWA, I have attended several environmental training courses and community involvement seminars offered by the FHWA Washington Office of Environmental Policy.

6. Region 1 of FHWA comprises all of the New England States, New York, New Jersey, Puerto Rico, and the Virgin Islands. There is a Division Office of FHWA in each of these locations, administered by a Division Administrator, who, while largely autonomous, is subject to guidance and direction from the Regional Office, inclusive of environmental matters.

Brief Review of FHWA NEPA Procedures.

7. As Director of the Regional Office of Environment and Design, I am familiar with and am responsible for reviewing each Division's procedures for the preparation of environmental impact statements (EIS). Reviews of these procedures by the Office of Environment and Design are to assure that each Division Office and State Highway Department in the Region is following FHWA's rules and regulations implementing the National Environmental Policy Act of 1969 (NEPA) as set out in 23 CFR Part 771 and in the Federal Highway Program Manual (FHPM), Volume 7, Chapter 7, Section 2.

8. Also a part of my duties, is active participation, guidance and review by myself and my staff in the preparation of each Draft and Final EIS and 4(f) Statement (required by 23 U.S.C. 138) prepared for any Federal-aid project within Region 1, inclusive of a field trip by one or more of my staff with Division personnel for each EIS within the Region; review and input into preliminary drafts of Draft EIS's; review and input into Draft and Final EIS's, evaluating studies included in and relied upon in Draft and Final EIS's, requiring additional studies, support data, maps, improved presentation of data and correction of inadequacies of such documents.

9. The Department of Transportation Act of 1966, Section 4(f), also Section 138 of Title 23 U.S.C. requires that the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of National, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from a historic site of National, State or local significance as so determined by such officials unless, (1) there is no feasible or prudent alternative and (2) such program includes all possible planning to minimize harm to such . . . , resulting from such use. This determination has been delegated to the Federal Highway Administrator for certain highway projects.

This legislation requires that FHWA and the State prepare what is referred to as a 4(f) Statement, which is usually attached to the EIS and which was the subject of substantial coordination, discussion and correspondence between FHWA and the State on the subject I-88 project, which will affect a 4(f) recreational area.

10. In order to effectively accomplish the above tasks and FHWA environmental requirements, my staff has been selected to provide a composite of environmental and engineering skills and have the following titles and related expertise. (One person may hold more than one position).

Regional Water Quality Engineer

Regional Air Quality Engineer

Regional Landscape Architect

Regional Environmental Impact Specialist

Regional Noise Engineer

Regional Hydraulics Engineer

Program Manager for Environment and Engineering

11. However, my office is only a part of the FHWA EIS participation and review process which is described below and which applies to the FHWA New York Division Office.

12. The draft EIS for a FHWA project, which is required to be prepared and circulated for public and governmental comment prior to preparing a final EIS, is prepared cooperatively by the State Highway Agency (the "State") and the FHWA Division Office for all major projects in accordance with the above-named regulations and directives, promulgated to meet the requirements of NEPA.

13. The States, including New York, often engage consultant firms with environmental expertise to assist in EIS preparation. This is often done because the State does not have some of the highly specialized environmental technicians needed to evaluate a particular aspect of a proposed project.

14. During the course of Draft and Final EIS preparation and study, the Area Engineer for the FHWA Division Office, who has the responsibility for the area of the State in which a project is located, has frequent formal and informal contracts with various State personnel. He is required to offer guidance and assistance to the State on projects in addition to reviewing the work prepared and in progress. This involves helping solve design, environmental and related problems.

15. Other Division personnel, with environmental and engineering expertise, also review and provide input into preliminary environmental studies, and the Draft EIS. Frequently, these draft EIS's will be sent back to the State by the Division for additional study, revision, rewriting or supplementing.

16. When the Draft EIS is finally found by the Division Office to be adequate pursuant to FHWA regulations, it is signed by the Division Administrator and circulated to the public and to all the appropriate local, State and Federal Agencies for comment.

17. The Draft EIS is also sent to the FHWA Regional Office at this time for formal review by and input from the Regional Office Interdisciplinary Task Force which reviews it for its adequacy under NEPA and implementing FHWA regulations.

18. The Regional Office Interdisciplinary Task Force ("Task Force") reviews the draft EIS in depth and each member provides comments as to its adequacy. The Task Force also may require revision, additional data or the modification of conclusions that seem to be in error.

19. The Task Force may include the following professional specialists, some of whom hold at times more than one of these positions:

- *Program Manager for Environment and Engineering (Chairman)

- *Regional Counsel

- Regional Bridge Engineer (as needed)

- *Regional Relocation Assistance Specialist

Regional Hydraulics Engineer (currently a member of my staff)

Regional Noise Engineer (currently a member of my staff)

Regional Water Quality Engineer (currently a member of my staff)

Regional Air Quality Engineer (currently a member of my staff)

Regional Landscape Architect (currently a member of my staff)

*Regional Urban Planner

*Regional Construction Engineer

Regional Environmental Impact Specialist (currently a member of my staff)

*Regional Civil Rights Officer

Deputy Regional Administrator

Director of Environment and Design

(*Official permanent members of the Task Force)

20. When a draft EIS is received from a Division Office, it is made available to the Task Force members for review at least three weeks prior to a formal meeting of the Task Force held on each draft EIS.

21. The Task Force is responsible to the Regional Administrator, Region 1, through the Office of Environment and Design, for the review of all draft EIS's. The Environmental Impact Specialist of the Office of Environment and Design obtains independently formulated comments from each member of the Task Force and compiles a review memorandum of all of these comments which is circulated to the Task Force members prior to the formal meeting on the Draft EIS.

22. A formal meeting of the Task Force is held where these comments are discussed in depth, and a group review of the draft EIS is carried on, and decisions are made as to: whether the document is an adequate environmental evaluation, adequately covers sensitive environmental areas, has sufficient support data and commitments to the minimization of harm, that the need for the project is demonstrated, that all reasonable and feasible alternatives have been evaluated, that the document is comprehensible to a reader without scientific or engineering expertise, and that it fulfills the requirements of FHWA regulations.

23. The Environmental Impact Specialist records the decisions made at the Task Force meeting and prepares a memorandum enumerating the findings and recommendations of the Task Force from the Director of Environment and Design to the Division Administrator. The Division Administrator transmits these comments along with those of his own office to the State for resolution cooperatively.

24. The State and Division Office, and on occasion, the Regional Office of Environment and Design work to prepare the final EIS, in which they respond to the comments of all agencies to whom the draft EIS has been circulated. The final EIS is then formally submitted to the Division where it must first be accepted by the Division Administrator before being subsequently submitted to the FHWA Regional Office for formal approval.

25. The Office of Environment and Design reviews the final EIS to assure that all the comments and questions of all agencies, as well as the Task Force comments, have been answered or resolved, and the Regional Counsel reviews it for legal sufficiency.

26. In accordance with FHWA regulations, the final EIS on certain projects must be submitted to the Washington, D.C. Headquarters Office for a thorough environmental and legal review prior to concurrence by the Office of the Secretary of Transportation and the FHWA Administrator before the Regional Administrator can approve and accept it for FHWA. In the subject project of this litigation there was extensive involvement of the Office of the Secretary in the development of the final EIS/4(f) document as is described herein. Generally, minor projects, having little environmental effect, do not require prior concurrence by the Administrator.

27. After review and concurrence by the Administrator, also, subsequent to requests for additional information and clarification of the EIS document, and based upon the recommendation of the Director of the Office of Environment and Design, the Regional Administrator accepts and signs the final EIS which is then formally submitted to the Council of Environmental Quality and other Agencies that have commented on the draft EIS. It is also made available to the public.

28. Approval and acceptance of the final EIS under current regulations is the location approval of a highway project by FHWA.

I-88: Oneonta to Schoharie-Schenectady County Line (PIN 9357.00 thru 9357.17)

29. The information presented below is based on records found in FHWA Region and Division files, State Region and Headquarters files, records and knowledge of my predecessors, Division personnel and my personal knowledge and beliefs.

30. The I-88 project from Binghamton to the Capital District area was initiated prior to the enactment of NEPA, but the project developed and progressed subsequent to NEPA and in accordance with FHWA's rules and regulations in effect at the time particular project actions were taken.

31. While FHWA participation in the EIS preparation process was not in the depth presently required by FHWA regulations, or so documented, there was substantial participation in the project design and development analogous to the presently required FHWA participation.

32. The particulars of the project involvement on the subject project of this litigation, I-88 from Oneonta to the Schoharie/Schenectady line, PIN's 9357.08 thru 9357.17, (the "project") begin with the participation of the area engineer (hereafter, the AE), who is the keyperson in the Federal-State relationship.

33. The AE is attached to the Division Office and is under the direct supervision of a District Engineer. There are four District Engineers in the New York Division and generally one AE for each of the State DOT Regions.

34. The AE covers all phases of the Federal-aid work in his area including planning, location, design, construction and maintenance. As a result he becomes well-known throughout the State Region and is intimately familiar with all projects in all phases in that State Region (his area).

35. During the preparation of the EIS for the subject project it was the practice of the AE to make a field trip to State Region Nine (in which the subject project lies) almost every month. This is evidenced by the attached record (Exhibit A) of field trips of AE Russell Eckloff for 1969 thru 1971 at which time he changed positions.

36. During these visits, it was his practice to visit the State Regional Office where he took part in discussions with Regional Office personnel, including the Regional Director, Assistant Regional Director, Design Engineer, Planning Engineer and the like. Generally, he offered guidance and direction regarding FHWA policies and directives and made meaningful input to the NYSDOT Regional Office work.

37. The FHWA District Engineer would also make visits with the AE from time to time and also contribute guidance to the State Regional personnel in design matters related to technical and environmental problems.

38. Correspondence records of the FHWA Regional, Division and State files indicate that there has been over 350 pieces of formal correspondence involving FHWA on this project's development, with FHWA as author/recipient of over 100.

39. This correspondence is listed in Exhibit B and pertains to the initial planning, design studies, environmental studies and draft and EIS 4(f) preparation processes as well as public hearing involvement and contact with other governmental agencies regarding the project.

40. All of this material is available in the FHWA or State files, and the significant documents dealing with environmental requirements are contained herein in four major exhibits divided into four basic categories as follows and provides the administrative record of FHWA participation in the NEPA process of the project:

FHWA Involvement in Draft EIS	- Exhibit C
FHWA Involvement in 4(f) determination	- Exhibit D
FHWA Involvement in Final EIS	- Exhibit E
FHWA Involvement in project activity, other than the EIS process	- Exhibit F

41. FHWA participation in the environmental process was formalized early in the environmental review process and project development. This included involvement in the appropriate circulation of the draft EIS, submitted to FHWA on June 30, 1971, consideration of the Corps of Engineers involvement, a detailed Regional and Division office commentary on the draft EIS and request for additional data to be included in the final EIS after review by the Task Force, as well as a thorough review by the appropriate Washington offices of FHWA.

42. Specifically, Exhibit C-8, dated September 20, 1971, contains specific FHWA requests for population data, traffic congestion data, 4(f) data, land use change effects, relocation information, fishing and marine life effects, effects of the project on pertinent educational facilities with remedial treatment where possible, detail as to water supplies of local communities, noise pollution data

and its effects, and water pollution effects from siltation and erosion, and a more realistic discussion of visual blight and discussion of population growth with and without the project.

43. Exhibit C-7 shows that the Washington Office of the Secretary of U. S. DOT requested additional 4(f) data.

44. Subsequent to receiving comments from other agencies and in response to and in coordination with FHWA, the State supplemented the draft EIS, including support data responsive to the comments of other agencies and to FHWA's specific requests for additional environmental evaluation.

45. The resulting final EIS was submitted to FHWA on October 15, 1971, and was thoroughly reviewed by the appropriate Division, Regional and Washington office personnel. (See Exhibit E-1.)

46. On October 18, 1971, the Division returned this final EIS requesting the inclusion of the 4(f) statement (that had been prepared while the draft EIS was also being prepared) because of the new FHWA regulations of PPM 90-1 requiring a 4(f) to be a part of a final environmental impact statement. (See Exhibit E-2.)

47. The question of 4(f) involvement for this project had arisen in June of 1971, when the State had determined that no 4(f) was required for the project on the Richmondville Recreation Area on the grounds that the taking involved was minimal and would not affect the recreational use of the area and so was not significant. (See Exhibit D-2.)

48. After some informational exchanges on this matter, FHWA informed the State on August 4, 1971, that the entire parcel from which a land taking was required, must be declared not significant before a 4(f) statement could be determined to be not required. (See Exhibit D-5.) FHWA also informed the State that a 4(f) determination would be required for the effects of the project on the fishing access easements of Schenevus Creek. (See Exhibits D-4 thru D-7.)

49. On August 30, 1971, the State had transmitted a 4(f) statement to FHWA on these two 4(f) areas; and on August 30, 1971, as required by FHWA the State had circulated the 4(f) statement to those governmental agencies which had previously received the draft EIS on the project. (See Exhibits D-8 thru D-10.)

50. However, in response to FHWA's determination under PPM 90-1 that the 4(f) statement and EIS had to be contained in the same document, (Exhibit D-11) the State on October 20, 1971, submitted a revised, combined EIS/4(f) document for FHWA approval and acceptance. (See Exhibit E-4.)

51. On December 6, 1971, the Department of the Interior (DOI) sent late comments on the Draft EIS for the project to the State which expressed various environmental concerns regarding the project and the Draft EIS and 4(f) statement.

52. Although the State strongly objected to the project delay which would result from preparing a response to the DOI comments (Exhibits E-9), FHWA required additional data to be obtained and additional environmental evaluations be made in response to the DOI comments, and for this data to be included in the final EIS.

53. On May 4, 1972, the State transmitted to FHWA a substantial addendum to the Final EIS/4(f) which contained the DOI comments and response data required by FHWA. (See Exhibit E-10.)

54. This transmittal was subsequently evaluated and approved at the FHWA Division and Regional levels and transmitted to Washington on May 10, 1972, as an FHWA document. (See Exhibit E-12.)

55. On June 15, 1972, the United States Department of Transportation, Office or the Assistant Secretary of Environment and Urban Affairs (TEU), after reviewing the FHWA combination EIS/4(f) and addendum, and after coordination with State personnel, notified the Administrator of FHWA that additional 4(f) information and supportive documentation was required prior to approval of the EIS/4(f) document. The TEU expressed concern as to the Richmondville Recreation area and also desired additional information as to the 4(f) determination for the Schenevus Creek fishing easements and the impact of area fishing sites. (See Exhibit E-15.)

56. As a result of this determination by TEU, a meeting was held on July 6, 1972, to resolve and clarify these 4(f) and related environmental questions. In attendance were FHWA Regional, Division and Washington personnel, as well as State officials, and the Assistant Secretary of TEU. (See Exhibit E-16.)

57. The results of the meeting were that the DOI concerns which had been raised on the Draft EIS and 4(f) were evaluated and discussed and a telephone arrangement was made for DOI and State personnel to meet in the future to consider and resolve these issues.

58. Additional results of the meeting were that the State, based on recent, more detailed location studies, had determined that it could locate the project so that its final location would not encroach on the fishing access areas of Schenevus Creek and agreed to revise the EIS/4(f) to reflect this new information.

59. Also, at this meeting, the State clarified the determination of the 4(f) as to the Richmondville Recreation Area taking, explaining that the acquisition was less than a half acre of undeveloped land in a flood plain area and which had no present recreational use. The alternative to the 4(f) taking was not prudent and feasible in terms of engineering and project design problems.

60. On July 13, 1972, FHWA Regional and Division personnel, State personnel and New York State Department of Environmental Conservation (NYDEC) personnel met with DOI personnel to resolve DOI concerns as to the EIS/4(f) and project effects on the environment. Agreement was reached for a revision of the document with additional review of NYDEC comments by the State with an addendum including response data to be prepared to satisfy DOI concerns. (See Exhibit E-17.)

61. On July 20, 1972, FHWA informed the State of TEU's memorandum of July 12, 1972, which had returned the initial EIS/4(f) submission to FHWA for revision and supplementation as had been agreed to by the FHWA, the State and DOI and which TEU stated it anticipated would result in a final EIS/4(f) that TEU would readily approve. (See Exhibit E-18.)

62. On August 3, 1972, the State, subsequent to coordination with NYDEC and FHWA, transmitted to FHWA for approval and acceptance, a revised final EIS/4(f) containing data resulting from further investigation and studies responding to DOI and TEU concerns. (See Exhibit E-19.)

63. The Division and Regional and Washington Offices of FHWA found the document to be in compliance with NEPA and FHWA regulations, as did TEU and the Secretary of U.S. DOT, who approved the EIS/4(f) on October 13, 1972, and subsequently transmitted it to the Council on Environmental Quality. (See Exhibits E-20 thru E-23.)

64. The final EIS/4(f) was subsequently made available to the public and location approval was granted by FHWA of the project on December 1, 1972. (See Exhibit E-24:)

65. In addition to the above specific environmental documentation, participation and guidance by FHWA, there has been continuing involvement with other aspects of the project, which have resulted in FHWA personnel developing an intimate knowledge of the details of the project, its planning concepts, community involvement, and the details of location and design possibilities, all of which are necessary for understanding of the environmental aspects and effects of a project.

66. Exhibit F of this affidavit contains correspondence evidencing FHWA's participation in the public hearing proceedings on the project, the development of I-88 for inclusion in the Interstate System, the involvement and familiarity with the location and design studies and reports which resulted in location approval, the development of control points and interchanges, and contacts with other agencies relative to the project.

67. In addition to the above project and EIS/4(f) preparation involvement, FHWA has also participated significantly in the preparation of a comprehensive environmental impact statement evaluating the entire 123 mile I-88 project from Binghamton to the Capital District termini at the New York State Thruway (I-90), in response to the direction of this Court in its Order dated November 14, 1973, Civil No. 72-CV-254.

68. Exhibit G, attached, contains correspondence detailing this extensive involvement in the Comprehensive Supplement, as well as in the EIS prepared for 5 other projects of the total I-88 project, which had not previously been subject to EIS preparation under FHWA rules and regulations, but which this Court determined to be necessary to meet the requirements of NEPA.

69. The correspondence in Exhibit G reveals intensive FHWA formal and informal participation in the EIS documents prepared, inclusive of field trips and frequent meetings by FHWA staff with State personnel and with the environmental consultants hired by the State to aid in the environmental evaluation of the subject projects, through review of pre-draft material and draft EIS material, a formal

Task Force review of the Draft EIS with specified directives as to inadequacies to be overcome, guidance from the Washington Office and from the Assistant Secretary of TES (formerly TEU) in the U. S. DOT Secretary's Office on the final EIS as well as from the Region and Division Office personnel.

Coordination with other governmental agencies is documented as is the FHWA direction of and participation in and the studies actually conducted for the EIS by the State and other independent environmental consultants.

70. The sum of these statements and the EIS for the Capital District Area of the I-88 Project, in conjunction with the comprehensive supplement, provide the final EIS for the whole of I-88 from Binghamton to the Thruway (I-90), as required by this Court. As such, it contains a broad evaluation of the environmental, social and economic effects of the entire 123 mile project, as a whole, and its specific effects on the State and Counties affected. In addition, it presents a detailed environmental evaluation of each logical project area so that a close scrutiny is made of each part of the I-88 Project, and no environmentally sensitive area or adverse effect is overlooked.

71. As of this date, there is an approved FHWA EIS for the entire I-88 Project from the City of Binghamton to the terminus of the project at the Thruway (I-90) in the Capital District area.

72. It is my opinion, based on my familiarity with and specific knowledge of FHWA regulations implementing NEPA, that the participation and guidance furnished by FHWA to the State in the development of these environmental studies and final EIS's, meets the requirements of NEPA, as amended, in that FHWA can legitimately take responsibility for the validity, scope, and direction of such documents. Thus, FHWA can accept and adopt the EIS on the subject project and on the I-88 Project as a whole, as FHWA documents, which adequately evaluate the environmental, social and economic effects of the entire I-88 Project and also those for each logical project within the I-88 Project.

S/ Wm. R. [Signature]

-13-

Sworn to before me this
14th day of June 1976

S/ James P. [Signature]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS
COMMITTEE, NEW YORK STATE COALITION
FOR SAFE TRANSPORTATION - N.Y.

STATE COST,
TOWN OF ROTTERDAM,
~~TOWN OF PRINCETON,~~
ST. FRANCIS COMMANDERY HALL
ASSOCIATION, INC., a/k/a KNIGHTS
OF ST. JOHN,

JOHN W. KESEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZE,
ARTHUR W. and JANICE SCOTT,
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIP,

CIVIL ACTION FILE NO.
72-CV-254

Plaintiffs,

- against -

A F F I D A V I T

JOHN A. VOLPE, Secretary of Transporta-
tion of the United States;
GERALD D. LOVE, Regional Federal
Highway Administrator of the
Bureau of Roads, United States
Department of Transportation;
ROBERT E. KIRBY, Division Engineer
of the Bureau of Roads, Federal
Highway Administration, United
States Department of Transportation;
THEODORE W. PARKER, Commissioner of
the Department of Transportation
of the State of New York; and,
CHARLES E. CARLSON, Regional Director,
New York State Department of
Transportation, Region 1,
And each and every one of the fore-
going individually as well as in his
designated official capacity,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DOUGLAS S. DALES, JR., being duly sworn, deposes and
says:

1. I am an Assistant Attorney General of the State
of New York. I was assigned to the defense of this litigation
at its outset and am fully familiar with the facts and

circumstances herein. I make this affidavit in connection with the defendants Schuler's and Carlson's motion to modify this Court's injunction dated November 14, 1973, which motion was adjourned to September 13, 1976, in Syracuse, New York, with a direction that the defendants file the additional documentation necessary to establish compliance with federal statutory and regulatory requirements for the entire I-88 project.

2. In order to fully comply with the Court's directive, the defendants would have to submit documentation with respect to PINS 1357.01-1357.04, in Schenectady County, and PIN 9357.18, in Broome County.

3. The documentation for PINS 1357.01-1357.04 is complete and is appended hereto and made a part hereof and will be more fully described and identified.

4. I am informed by representatives of the Department of Transportation that the documentation for the section from I-81 to Port Crane, in Broome County, will not be available for about one year. Attached hereto and made a part hereof as Appendix "A" is the affidavit of Raymond T. Schuler, Commissioner of Transportation, which details the history and present status of PIN 9357.18.

5. The following materials are appended to and made a part hereof:

1. Appendix "B" - Final Supplemental Environmental Impact Statement and §4(f) Statement, approved and adopted June 14, 1976, by FHWA;
2. Appendix "C" - Copy of 41 Federal Register 26251, Council on Environmental Quality Notice of Availability of Final Supplemental Environmental Impact Statement and §4(f) Statement for PINS 1357.01-1357.04, published June 25, 1976;
3. Appendix "D" - Transcript of minutes of Supplemental Corridor Public Hearing held January 23, 1973;
4. Appendix "E" - Notice of Combined Corridor - Design Public Hearing, published twice in each of six newspapers during January and February 1973;

5. Appendix "F" - Copy of slide presentation made at Combined Corridor Design Public Hearing held February 25 and 26, 1975;
6. Appendix "G" - Transcript of minutes of Combined Corridor Design Public Hearing held February 25 and 26, 1975;
7. Appendix "H" - Handout given to each person attending February 25 and 26, 1975 public hearing and available prior thereto upon request;
8. Appendix "I" - Certification of Compliance with Federal Hearing requirements relating to PINS 1357.00-1357.04;
9. Appendix "J" - Correspondence from U.S.C.G. from March 14, 1975 - June 7, 1976 making "non-navigability" determined as to Normans Kill Creek, in PIN 1357.03;
10. Appendix "K" - Transcript of minutes of Design Public Hearing held August 23, 1973, as to PINS 9357.08-9357.11;
11. Appendix "L" - Transcript of minutes of Design Public Hearing held November 27, 1973, as to PINS 9357.12-9357.15; and
12. Appendix "M" - Transcript of minutes of Design Public Hearing held February 25, 1976, as to PINS 9357.16-9357.17.

6. Appendix "B", the Final Supplemental Environmental Impact Statement relating to PINS 1357.01-1357.04, establishes the defendants' compliance with 42 U.S.C., §4332(2)(c) (NEPA), with 23 U.S.C., §138, and 49 U.S.C., §1653(f) [§4(f) statements required per the Federal Aid Highway Act and the Department of Transportation Act], and with 42 U.S.C., §1857, et seq. (Clean Air Amendments of 1970).

7. Appendices "C", "D", "E", "F", "G", "H" and "I" establish the defendants' compliance with the hearing requirements of 23 U.S.C., §126, and 23 CFR, Part 790 (formerly FPM 20-8), with respect to PINS 1357.01-1357.04.

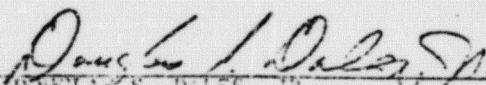
8. Appendix "J" establishes the lack of the necessity for Coast Guard bridge permits for PINS 1357.01-1357.04.

9. Appendices "K", "L" and "M" supplement the public hearing materials already before the Court regarding PINS 9357.08-9357.17.

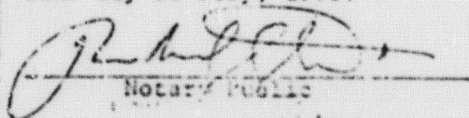
10. There are also available, should the Court request it, several map exhibits which were available for public inspection at the various public hearings held in connection with this project. For the most part, such maps are contained in much smaller scale in the environmental impact statements for the I-88 project presently before the Court.

11. With the exception of PIN 9357.18, I-81 to Port Crane, in Broome County, all applicable federal requirements have been met for the entire I-88 project. In view of the relatively long anticipated delay in completing the requirements regarding PIN 9357.18, as outlined in Appendix "A", the State defendants respectfully renew their motion dated April 16, 1976, for modification of this Court's order of November 14, 1973, to permit federal financial participation, such motion now to include PINS 1357.01-1357.04, in Schenectady County, as well as PINS 9357.08-9357.17, in Otsego and Schoharie Counties, or, in the alternative, ask that summary judgment in defendants' favor dismissing the complaint with respect to such PINS be granted.

WHEREFORE, it is respectfully requested that the relief sought by defendants be granted in its entirety.


DOUGLAS S. DALES, JR.
Assistant Attorney General

Sworn to before me this
22nd day of July, 1976.


Notary Public

July 23, 1976

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDWILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SAME TRANSPORTATION -
N. Y. STATE COST,
TOWN OF ROTTERDAM,
TOWN OF PRINCETOWN,
ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESSEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and BELLA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZE,
ARTHUR W. and JANICE SCOTT
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIP,

Plaintiffs,

- against -

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads,
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department
of Transportation of the State of New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individually
as well as in his designated official capacity,

Defendants.

CIVIL ACTION
FILE NO.
72-CV-254

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

RAYMOND T. SCHULER, being duly sworn, deposes and says:

1. I am the Commissioner of Transportation of the State of
New York and make this affidavit in support of an application to modify
this Court's Memorandum-Decision and Order dated November 14, 1973,
which granted a preliminary injunction which, in part, barred the Federal
defendants from granting plans, specifications and estimates approval
for certain I-88 projects. Among the FHN's to which the preliminary

injunction applies are PIN's 9357.03 through 9357.17, PIN's 1357.01 through 1357.04 and PIN 9357.18. The modification requested by the defendants is the removal of injunctive restraints on PIN's 9357.03 through 9357.17 and PIN's 1357.01 through 1357.04. In addition, the defendants request conditional relief on PIN 9357.18.

2. I am fully familiar with the facts and circumstances stated herein and make this affidavit upon personal knowledge and upon information and belief. All estimates contained herein were compiled by the professional staff of the New York State Department of Transportation using sources and estimating techniques generally accepted by professional planners and engineers.

3. My background and experience have heretofore been presented to this Court in my previous affidavits sworn to September 24, 1973, December 11, 1975 and April 12, 1976.

4. On June 28, 1976, the State defendants moved this Court for relief from the injunctive restraints which barred the use of Federal funds on PIN's 9357.03 through 9357.17. At that time, the Court indicated that the Motion would be adjourned until September 13, in view of the progress made by the State and Federal defendants in completing all environmental statements for the entire I-88 route. The Court directed the defendants to file further papers and documents evidencing the progress made with respect to the environmental studies for PIN's 1357.01 through 1357.04 and PIN 9357.18.

5. PIN's 1357.01 through 1357.04 are more commonly known as the Schenectady terminus. The detailed Final Supplemental Environmental Impact Statement for these PIN's has been filed with the Council on Environmental Quality. On July 14, 1976, the 30-day commenting period allowed by CEQ regulations expired.

6. As of July 14, 1976, there exist detailed approved final impact statements for each and every PIN of the I-88 project with the exception of the three mile I-88/I-81 connector (PIN 9357.18). There is also an overview for the entire I-88 route which deals with the environmental effects of the entire route on a broad scale.

7. PIN 9357.18, commonly known as the I-88/I-81 connector, is a planned project of approximately three miles in length. The entire project, as planned, is within Broome County and passes through the Towns of Chenango and Fenton. The easterly terminus of this project (PIN 9357.18) is the westerly end of a section of fully controlled access four-lane expressway which has been open to traffic since 1969, is now designated as Route 7, and which will be incorporated into I-88. The westerly terminus of PIN 9357.18 is a section of I-81 which has been opened to traffic since 1966.

8. The connector (PIN 9357.18) lies between two completed sections of highway. It is intended to serve as an interstate connection between these highways, but it will also greatly serve to improve traffic circulation in and access to the general area of Binghamton. These localized objectives have been analyzed and recommended by the Binghamton Metropolitan Transportation Study.

9. The Department of Transportation's environmental studies have disclosed that, should the connector be built, the environmental impacts of its construction, existence and use would be essentially felt in the project area and the effects of these impacts would be dissipated within a short distance from either termini of the connector.

10. The entire I-88 project between Oneonta and Binghamton is at present either completed or relatively close to being completed with the exception of the connector. Should the connector never be built, I-88,

- 4 -

when completed, will still have a logical terminus within the Binghamton vicinity which is capable of handling the traffic flowing off of and onto the highway. That terminus is Route 7.

11. Since the connector (PIN 9357.18) serves to connect two already completed segments of highway, and since the environmental effects of the connector are localized, the connector (PIN 9357.18) is, from a practical analysis, a project which can be given separate consideration from the remainder of I-88.

12. Since all environmental studies required by the National Environmental Policy Act have been completed, and impact statements prepared, circulated, commented upon, finalized and filed for the entire I-88 project, with the exception of the detailed Final Environmental Impact Statement for PIN 9357.18, and since PIN 9357.18 is a project upon which the remainder route is not dependent, there should be no further reason to continue the judicial restraint upon any other I-88 project.

13. It is the Department of Transportation's best estimate that the detailed Final Environmental Impact Statement for the I-88/I-81 connector will be completed and filed with CEQ in approximately nine months.

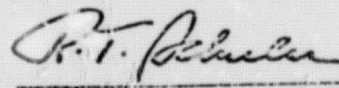
14. Conditioning relief from the present judicial restraints on PIN's 9357.08 through 9357.17 and PIN's 1357.01 through 1357.04 upon the completion of the Final Environmental Impact Statement for the connector (PIN 9357.18) will further delay these projects which are ready to be advanced to the stage where right-of-way is acquired. The cost of such unnecessary delay will be borne by the State and Federal Governments and ultimately by every taxpayer. These costs are detailed hereafter.

15. A study of the costs of continued usage of Route 7 versus usage of a completed I-88 for that portion of I-88 between Toronto and Johnstown, attached and submitted herewith, are to be borne by the

traveling public. The increased yearly operational costs of the estimated number of vehicles traveling between Oneonta and Schenectady on Route 7 as opposed to a completed I-88 would be \$785,000. The estimated increase in yearly accident costs would be \$83,000. The cost to the general public in additional time expended due to the necessity of the use of the present Route 7 rather than a completed I-88 is approximately \$686,000. Thus, the total additional costs to the traveling public for each year of delay in the completion of I-88 between Oneonta and Schenectady is estimated to be \$1,554,000.

16. A second cost of delay in the progression of I-88 between Oneonta and Schenectady is caused by the present nine percent annual inflation rate in the construction industry. The I-88 projects between Oneonta and Schenectady are now estimated to require a total construction cost of approximately \$288 million. Assuming the present nine percent inflation rate for the construction industry will continue, the estimated cost for one year of delay will be approximately \$26 million.

WHEREFORE, your deponent respectfully requests that this Court's Memorandum-Decision and Order dated November 14, 1973 be amended so as to remove all injunctive restraints against the granting of FCE approval for those PIN's known as PIN's 9357.08 through 9357.17 and PIN's 1357.01 through 1357.04. In addition, your deponent respectfully requests that all judicial restraints against the granting of FCE approval for PIN 9357.18 be conditionally removed, conditioned upon the finalization of the FCE for PIN 9357.18.


RAYMOND T. SCHULER

Sworn to before me this

22nd day of July 1976.

Notary Public

WILLIAM D. MURPHY
Notary Public, State of New York
Qualified on June 22, 1974
My Commission Expires March 22, 1978

NOTICES

20251

ENVIRONMENTAL PROTECTION AGENCY

Contact: Mr. Rebecca W. Baumer, Director, Office of Federal Activities, Room 5040, 401 M Street SW, Washington, D.C. 20460, 202-755-0100 (and 400).

Draft

Interim Heavy Duty Engine Regulations, 1975. June 14: This statement proposes to set more stringent exhaust emission standards for new heavy duty engines, to revise exhaust gas sampling and analysis procedures, and to set a more stringent diesel engine peak smoke emission level. To assure achievement of the desired standards, preproduction heavy duty engines will be tested to check the levels of emissions prior to certification for sale in vehicles in the United States. The standards and test procedure changes are being prepared for 1979 and later model heavy duty engines. (EIR Order No. 60353.)

Sludge Disposal and Land Reclamation, Fulton County, Ill. June 17: This statement presents an analysis of the methodologies utilized by the Metropolitan Sanitary District of Greater Chicago for the application of sludge on strip mined land in Fulton County, Illinois. Since the project is already being implemented, this statement presents the current and projected impacts of continued operations. Adverse effects include impact on water, soils, odor, and noise. (Region V.) (EIR Order No. 60400.)

FEDERAL POWER COMMISSION

Contact: Dr. Jack M. Holzmacher, Acting Asst. Director for Environmental Quality, 401 G Street NW, Washington, D.C. 20426, 202-275-4701.

Final

El Paso, Transco LNG Terminal, New Jersey, Gloucester County, N.J. June 13: Proposed is the granting of authority to El Paso Eastern Co. and Transco Energy Co. for the importation of LNG from Algeria, the construction of a terminal at Gloucester County, New Jersey, and the delivery, exchange and sale of the gas (in reformed form) in interstate commerce. The terminal facilities will include a 46,000 barrel Blaker-C fuel oil storage tanks, vaporizer units, three 600,000 barrel LNG storage tanks, an unloading dock, and related structures. Environmental impact would result to "total vegetation, soils, wildlife, water quality, and noise levels." Comments made by: AEP, USDA, COE, AEC, DDC, CBQ, DRBC, EPA, HEW, EUD, DOI, and State and local agencies. (EIR Order No. 60311.)

GENERAL SERVICES ADMINISTRATION

Contact: Mr. Andrew E. Rauden, Executive Director of Environmental Affairs, General Services Administration, 1025 and P Streets NW, Washington, D.C. 20405, 202-343-4161.

Final

Virginia Heating Plant Improvements, Arlington County, Va. June 16: The project involves the installation of two electric precipitators and upgrading (by modification or addition) of the smokestack treatment system for the Virginia Heating Plant to meet the requirements of both the existing and future proposed boiler modifications. In addition, other repairs and improvements will be made at the plant. Emissions will continue to be low despite circumstances such as the existing four coal fired boilers. Adverse impacts include the temporary increase in noise, dust and traffic congestion, the interruption of steam production, the industrial appearance of the precipitation, the land committed for installation, and intermittent

noise. Comments made by: EPA, DOI, DOT, and State and local agencies. (EIR Order No. 60312.)

DEPARTMENT OF HUD

Contact: Mr. Richard E. Brown, Director, Office of Environmental Quality, Room 7233, 451 7th Street SW, Washington, D.C. 20410, 202-755-6300.

Final

Camp Formosa Area Urban Renewal, Columbia, Richland County, S.C. June 14: The statement concerns the replanning of an urban renewal project for the "Black Bottom" area of the Camp Formosa Area. The original plan to use the area for housing was rejected because of the construction of a liquid propane gas bulk storage facility on adjacent property. The urban renewal area will be enlarged and further EIRs filed on development of new areas. Comments made by: FPC, DOI, COE, EPA, HEW, ICG, DDC, and State and local agencies. (EIR Order No. 60383.)

NUCLEAR REGULATORY COMMISSION

Contact: Mr. Bernard Remick, Director of Division of Reactor Licensing, P-722, NRC, Washington, D.C. 20555, 301-492-1370.

Draft

Neutron Dosimeters Containing Thorium, June 16: This statement concerns a proposed amendment of USNRC regulations to exempt from requirements for a license, the receipt, possession, use, transfer, or importation into the United States of any quantity of thorium contained in personnel neutron dosimeters provided that each dosimeter does not contain more than 50 milligrams of thorium. This improved service could allow better estimates to be made of the radiation doses received by persons exposed to fast neutrons and, thus, could facilitate compliance with the requirements of radiation protection standards. (EIR Order No. 60399.)

NUCLEAR REGULATORY COMMISSION

Contact: Mr. Bernard Remick, Director of Office of Environmental Affairs, U.S. Department of Transportation, 400 7th Street SW, Washington, D.C. 20390, 202-425-4357.

FEDERAL AVIATION ADMINISTRATION

Final

Marion Municipal Airport, Grant County, Ind. June 14: Proposed is a project for the 5-phase improvement of the Marion Municipal Airport. Phase 1 to be completed by 1973, includes plans to acquire 200 acres of land, construct a runway, two taxiways, a service drive and parking lot, perimeter fencing, a runway and lightning, and Phase 1 of the terminal building. The land acquisition will displace 7 families. The project will also result in increased air and noise pollution, relocation of Bell Creek, and the partial clearing of approximately 4 acres. Comments made by: EPA, USDA, DOI, COE, DDC, and State agencies. (EIR Order No. 60374.)

FEDERAL HIGHWAY ADMINISTRATION

Final

FAS Route 885, Del Norte County, Calif. June 14: The project involves plans to approximately 2 miles of FAS Route 885, South Fork Road, which is located in Six Rivers National Forest, Del Norte County. The project is to repair storm damage which closed the road in 1971 and 1972. Several alternative repair proposals are considered. There will be minor and intermittent impacts to the South Fork River which will cause loss of land down-

stream if adequate repairs are not made. Comments made by: DOT, EPA, USDA, DOI, and State and local agencies. (EIR Order No. 60441.)

Edwin 2nd, San Diego, San Diego County, Calif. June 14: Proposed is the construction of 12 miles of six lane freeway which will complete the connection between I-5 and I-805. Forty-four acres of urban land has been committed to right-of-way; a 4 (f) section for the use of a section of Southcrest Park has been approved. Comments made by: DOT, DOI, and EPA. (EIR Order No. 60417.)

SR 21, (Blinding Blvd.), Clay County, Fla. June 14: The statement concerns the upgrading of Blinding Boulevard (State Road 21) to a divided, four-lane facility from the intersection with SR 215 to Robin Road. The improvement will provide for increased traffic generated by numerous residential communities now planned from "Jacksonville South" to Orange Park. Adverse impacts include the displacement of families and businesses and noise level impacts on Huddell Elementary School. Comments made by: EPA, DOI, HUD, HEW, USDA, and State and local agencies. (EIR Order No. 60400.)

K-7 Junction K-10, K-12, and K-7 to K-10 (Supplement), Johnson County, East, June 14: The proposed project entails improvements within the Kansas City SMSA in Johnson County on K-7 from the junction of K-10, K-12 and K-7 north to 7 mile north of north junction of K-13. The proposed improvement involves the modification of existing roadway (two and four lanes) to four lane facility. A project noise analysis is included. Comments made by: None. (EIR Order No. 60380.)

SR 2025, Rapides Parish, La. June 14: Proposed is the construction of a 5.6 mile segment of State Route LA 2025 between the municipalities of Thibodaux and Thibodaux. The four-lane controlled access facility will displace 12 families and will require the commitment of 215 acres of residential and forest land to roadway use. (Region 6.) Comments made by: HUD, USDA, COE, DOI, HEW, COE, DOT, and State and local agencies. (EIR Order No. 60391.)

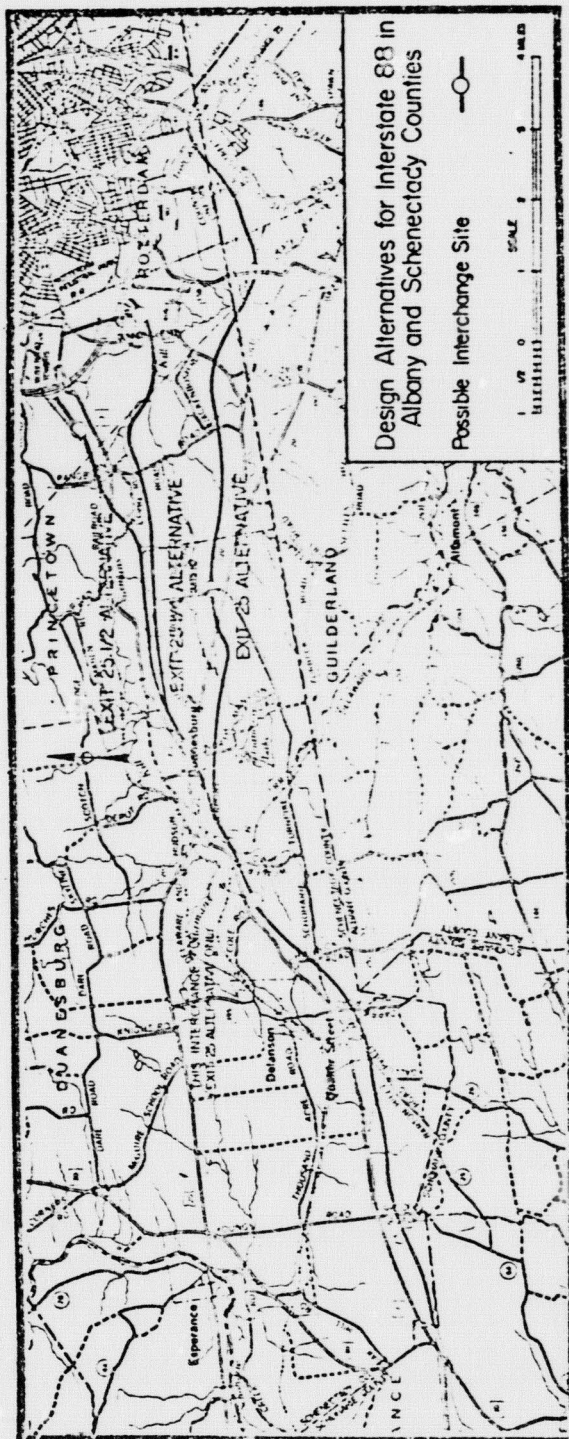
I-28, Schoharie and Albany Co., Supplement, Schoharie and Albany Counties, N.Y. June 18: The statement is a final supplement to a final EIS submitted to CEQ June 28, 1972. Proposed is the construction of an 18-mile segment of I-28 from the Schoharie-Schoharie County line to the New York State Thruway (I-190). The number of families and businesses varies with alternative. 4(f) determinations are necessary concerning the Duane Mansion, the Duane-Wemple House, and Quaker Street. Comments made by: USDA, DDC, HEW, DOI, DOT, EPA, USCG, FPC, and State and local agencies. (EIR Order No. 60407.)

I-270, East St. Valley Expressway, I-270-3, Allegheny County, Pa. June 18: The proposed action consists of an 8-lane limited access highway to be an integral part of Interstate 270 with work beginning at Legislative Route 1021, Section 2, proceeding north to Legislative Route 1021, Section 4 with an interchange provided at Mount Pleasant Road. The project is 2.5 miles in length and located in the City of Pittsburgh, Pennsylvania. Adverse effects include the acquisition of an additional 550 parcels of land and the removal of two churches. (Region 3.) Comments made by: HEW, EPA, USDA, DOI, and State agencies. (EIR Order No. 60412.)

GARY L. WIDMAN,
General Counsel.

[EIR Doc. 75-10375 Filed 6-24-75, 8:45 am]

BEST COPY AVAILABLE



PUBLIC HEARING INTERSTATE ROUTE 88

Schoharie - Schenectady
County Line

to

Interstate Route 90
(New York State Thruway)

TUES. FEB. 25

and

WED. FEB. 26

both
days { 3:00 pm 'til 6:30 pm
and
7:30 pm 'til 11:00 pm

SCHALMONT HIGH SCHOOL

STATE OF NEW YORK
Hugh L. Carey, Governor
DEPARTMENT OF TRANSPORTATION
Raymond T. Schuler, Commissioner

PROJECT DESCRIPTION

The 18-mile portion of I-88 to be evaluated lies at the northeastern end of the transportation corridor between Binghamton and the Capital District and includes the eastern terminus of the expressway.

Three alternative routes are proposed, each having a different terminus location. Two are totally within Schenectady County, and one lies in both Schenectady and Albany Counties.

The southernmost route, called "The Exit 25 Alternative," meets I-890 just north of the toll plaza at Interchange 25 of the New York State Thruway (I-90). The northernmost path, called "The Exit 25½ Alternative," follows NY 7 and meets the Thruway near WGY's radio transmitting tower. "The Exit 25¼ Alternative" is located between the other two, and terminates at the Thruway near Rotterdam Industrial Park (formerly Schenectady Army Depot). The first nine miles of I-88's proposed path from the Schenectady-Schenectady County Line to Duaneburg are identical for all three route-location alternatives.

The Exit 25 Alternative

Proceeding east in Schenectady County from the county line, I-88 will roughly parallel NY 7, south of it, to Duaneburg. Sheldon Road will be bridged, requiring no reconstruction of this county road.

The proposed route swings south of Quaker Street, passing between the hamlet and the main body of the Darby Hill Wildlife Preserve. At Gallupville Road two alternatives that maintain local access are proposed: (1) dead-end Gallupville Road north of I-88 with a vehicle turn-around area and relocate its other segment along I-88's southern boundary to intersect Darby Hill Road; or (2) route Gallupville Road over I-88 with a new bridge.

Both Darby Hill Road and Schoharie Turnpike will bridge I-88. At Chadwick Road three alternatives are proposed: (1) route it over I-88 with a new bridge; or (2) relocate Chadwick Road along I-88's northern boundary to intersect Schoharie Turnpike and dead-end its other segment with a vehicle turn-around area; or (3) dead-end Chadwick Road on both sides of I-88 with vehicle turn-around areas.

At a location about halfway between Quaker Street and Duaneburg, I-88 will interchange with NY 7 west of Weaver Road. The expressway will bridge both Weaver Road and the D&H Railroad, and then will curve along the base of a hill a few thousand feet south of US 20 at Duaneburg. North Mansion Road will bridge the expressway.

I-88 will then curve under US 20 and swing easterly to interchange with Sonts Road about one-quarter mile north of US 20. I-88 will pass under Pangburn Road and roughly parallel Quackenbush Road, south of it, to NY 465, which bridges the expressway.

Further east, I-88 will interchange with NY 158 approximately one-half mile south of County Line Road. After passing under NY 158, I-88 will parallel County Line Road, bridging the Penn Central Railroad,

and then will swing north to cross under Church Road at a sharp bend in that road.

I-88 will bridge the Thruway less than one-quarter mile west of the NY 146 crossing, requiring Fort Hunter Road to be dead-ended. I-88 will terminate at I-890 with an interchange about one-half mile north of the Thruway. Local access to the expressway system will be provided on NY 146. Thruway toll booths and Curry Road will be relocated to fit the planned interchange layout; Wayto Road, Marra Lane, and an existing expressway access ramp will be dead-ended at NY 146.

Exit 25¼ Alternative

I-88's proposed location for the first nine miles to Duaneburg is the same for this alternative as was described for the Exit 25 Alternative. An I-88 interchange, however, is not planned west of Duaneburg for the Exit 25¼ Alternative.

I-88 will swing north from its location along the base of the hill near Duaneburg, crossing beneath US 20 to an interchange site east of the hamlet. The Duaneburg Interchange is designed to serve traffic traveling NY 7 and US 20; it will be located between these routes about three-quarters of a mile east of their intersection.

East of the Duaneburg Interchange I-88 will continue its gradual descent south of NY 7 to Pangburn Road, which it bridges between the Normanskill and Vernon Drive. I-88 will then follow the Normanskill, bridge it near Rotterdam's town line, and again parallel it. Dunnsville Road will be bridged one-quarter mile south of the Vempe Road intersection.

I-88 will terminate with an interchange and toll booths at the Thruway southwest of Rotterdam Industrial Park. Local access to the expressway system from NY 7 east of the Thruway will be provided by a mile-long, four-lane arterial, that intersects Dunnsville Road along the way.

Exit 25½ Alternative

I-88 in this location will be the same as was described for Exit 25½ Alternative up to a point about one mile east of the Duaneburg Interchange. I-88 will then proceed along a more northerly path closely following NY 7.

It will remain south of NY 7, bridging the Normanskill and passing under Birchwood Drive about one-quarter mile south of NY 7. The expressway will then curve north, bridging NY 7 about one-half mile west of the Pangburn Road intersection. Pangburn Road will be bridged between this intersection and the D&H Railroad tracks.

Local access from NY 7 to I-88 will be provided by an interchange located about one mile west of the Thruway. I-88 will terminate with an interchange and toll booths at the Thruway between NY 7 and the D&H Railroad.

HISTORY OF PROJECT

In October 1968 the NYSDOT requested federal approval of an interstate route addition from Binghamton to the Capital District. Federal approval was granted in December for an expressway that would terminate at I-890 near Thruway Interchange 25.

Location alternatives for the route within Schenectady and Albany Counties were then developed, and a public hearing on the corridor proposals was held during May, 1970. Four basic issues emerged: the need for the project; the location of I-88's eastern terminus; the preservation of ecological and environmental areas; and the preservation of residential development patterns and values.

Environmental issues raised at this public hearing led to the decision during the spring of 1971 to no longer consider alternative routes through the Bozenkill watershed. In July, a draft environmental impact statement was completed for the project, and by August, NYSDOT announced its preference for the I-88 path comprised of location alternatives B-C-H. Local and regional interests opposed to I-88's proposed terminus near Thruway Interchange 25 united during the fall of 1971 and sought public support for their views on I-88.

The proposed B-C-H routing roughly parallels NY 7, passing one-half mile south of Quaker Street. At Duaneburg it swings eastward to cross US 20 approximately 1½ miles east of the hamlet. From here it continues

through the towns of Duaneburg, Princetown, Guiderland, and Rotterdam, crossing the Thruway just west of Interchange 25, and terminates at I-890. (The Exit 25 Alternative now proposed is designed essentially within the B-C-H route.)

The final environmental impact statement for I-88 location alternatives terminating near Interchange 25 was prepared, and during April 1972, received federal approval. FHWA approved NYSDOT's recommended location for I-88 (the B-C-H path) in October with the following conditions. NYSDOT must expand their study northeast of US 20 to include possible connections with the Thruway between NY 7 and Interchange 25 and discuss the results at a supplemental public hearing.

NYSDOT found acceptable alternative terminus locations with the Thruway, and a supplemental public hearing was conducted during January 1973 to verify public support. Based on statements, comments, and suggestions received, NYSDOT now proposes two new terminus alternatives, known as Exit 25¼ and Exit 25½, in addition to the original I-890 terminus proposal now named Exit 25. A draft environmental impact statement covering the three alternative routes proposed is now available for your review. Interested citizens will have an opportunity to express their views on NYSDOT's proposed alternatives at the upcoming public hearing on February 25 and 26, 1975.

SUMMARY OF IMPACTS

I-88 will in some way change present social, economical, and environmental characteristics of the area it will pass through. These have been described and discussed in detail in the project's draft environmental impact statement, which is available for public review. Following is a recap of major I-88 consequences which will help you to evaluate each alternative routing on the enclosed postcard.

The Exit 25 Alternative

On this location I-88 will be about 17.9 miles long, cost approximately 78 million dollars to build, and require nearly 670,000 dollars annually to maintain and operate. This alternative is the quickest, most direct route to Thruway Interchange 25 and destinations beyond to the north and east. Local access to and from I-88 will be provided by four interchanges, well-spaced throughout the project area.

Residential and commercial development pressures for prime land along this alternative will be highest around the NY 150 interchange site in the towns of Rotterdam and Guildersland. Development west of Penn Central's tracks and north of US 20, however, would conflict with Guildersland's masterplan, which envisions the area as best suited for open space and agricultural uses. Princetown will experience increased demand for homesites in the southern part of town, reinforcing present settlement trends. I-88 interchanges at Suits Road and NY 7 in the town of Duaneburg will increase development pressures only slightly for lands nearby. Both are compatible with the town's land use plan to the extent that new growth will be concentrated in the southern part of town.

If the Exit 25 Alternative is built, 1210 acres of land will be acquired from 188 owners. Another 380 acres will be severed from existing parcels and left without access. Relocations will include 42 families and 2 businesses. Property acquisitions for I-88 will force four active farms out-of-business. Estimated loss in tax revenue at 1973 rates for towns totals \$10,075, and for school districts is \$15,400.

To some individuals this alternative will cause objectionable noise levels at 36 locations, which is 10 more than would be affected if I-88 were not built. Measures to abate predicted noise levels at these sites are being studied, and if economically justified, will be incorporated in I-88's construction.

Air pollution from highway sources in 1980, the most critical year with I-88 in operation, will be significantly improved over present conditions due primarily to vehicle emission controls. Carbon monoxide emissions will be reduced 30 percent, hydrocarbons 19 percent, and nitrogen oxides 5 percent along the Exit 25 Alternative route. National Ambient Air Quality Standards have established the one hour maximum concentration for carbon monoxide as 35 parts per million (ppm) and the eight hour average as 9 ppm. Carbon monoxide levels will be highest near Thruway Interchange 25. Calculated levels for 1980 are 14.2 ppm and 1.6 ppm, respectively.

The Exit 25A Alternative

This 14.7 mile long route will cost approximately 57 million dollars to construct, and nearly 500,000 dollars annually to maintain and operate. It will best serve Rotterdam Industrial Park and a growing commercial area nearby by providing a new Thruway interchange with convenient local access. Two interchanges will connect I-88 with local routes: one at Duaneburg serving US 20 and NY 7; and another east of the Thruway serving NY 7. Arterial systems planned to serve Rotterdam in the distant future can be joined with this I-88 location alternative without costly interchange modification.

I-88 will act as a catalyst for residential development of land in Rotterdam bordering NY 7 and Dunnsville Road on both sides of the Thruway. Commercial activity now centered in Rotterdam Industrial

Park will likely grow at an increased rate as a result of more convenient Thruway access. The Exit 25A Alternative will cross some of Princetown's prime developable lands with little benefit to its residents located nearby. Some increase in development due to I-88 is expected in Duaneburg along NY 7 and US 20 and has been considered in the town's land-use plan.

This routing of I-88 will require 1050 acres of land from 122 owners and will sever without access an additional 320 acres from existing parcels. Residential relocation will be necessary for 10 families. No business will be relocated, nor will any farms be forced out-of-business. Estimated loss in tax revenue at 1973 rates for towns totals \$6,865, and for school districts is \$8,820.

Noise levels along I-88's path will be objectionable to some individuals at 30 sites, which is 13 more than would be affected if I-88 were not built. Measures to abate predicted noise levels at these sites are being studied, and if economically justified, will be incorporated in I-88's construction.

With I-88 in operation in 1980, reductions in vehicle emissions from present levels along this alternative's route are estimated to be 38 percent for carbon monoxide, 34 percent for hydrocarbons, and 22 percent for nitrogen oxides. Carbon monoxide levels near Thruway Interchange 25 are calculated to be 14.9 ppm for the one hour average and 1.8 ppm for the eight hour average in 1980.

EXIT 25A Alternative

If this location alternative is built, I-88 will be about 13.7 miles long, cost approximately 54 million dollars, and require nearly 500,000 dollars annually to maintain and operate. It will be the newest and shortest route from Duaneburg to the intersection of Altamont Avenue and Curry Road in Rotterdam, and General Electric in Schenectady. This alternative will also be the most direct route to the Thruway for travelers with destinations further west. Two interchanges will connect I-88 with local routes: one at Duaneburg serving NY 7 and US 20; and another less than one mile southwest of the Thruway serving NY 7.

I-88 will encourage residential development of land in Rotterdam bordering NY 7 and Dunnsville Road on both sides of the Thruway. Its effect on commercial activity east of the Thruway is expected to be only moderate, because expressway access is more than a mile away over local roads. Princetown will experience increased development pressures, because I-88's interchanges will be located just beyond the town's east and west boundaries. Demand for prime sites along NY 7 and US 20 in Duaneburg will increase. Duaneburg's land-use plan has made provisions for this expected increase in development.

On this location I-88 will require 310 acres of land from 99 owners and will sever from access an additional 235 acres from existing parcels. Nine families and one business will require relocation. Property acquisitions for I-88 will force two active farms out-of-business. Estimated loss in tax revenue at 1973 rates for towns totals \$6,670 and for school districts is \$7,920.

I-88 will cause objectionable noise levels to some individuals at 27 sites in the project area, which is 13 more than would be affected if I-88 were not built. Measures to abate predicted noise levels at these sites are being studied, and if economically justified will be incorporated in I-88's construction.

In 1980 reductions in vehicle emissions along this alternative's path are estimated to be 41 percent for carbon monoxide, 33 percent for hydrocarbons, and 24 percent for nitrogen oxides. Carbon monoxide levels near Thruway Interchange 25 are calculated to be 14.9 ppm for one hour average, and 1.8 ppm for the eight hour average in 1980.

EVALUATION TABLE FOR ALTERNATIVE ROUTES

	EXIT 25	EXIT 25A	EXIT 25B
COST (Million Dollars)	78	57	54
LENGTH (Miles)	17.9	14.7	13.7
ANNUAL MAINTENANCE (Thousand Dollars)	670	560	500
REQUIRED R.O.W. (Acres)	1210	1050	910
SEVERED R.O.W. (Acres)	380	320	235
RELOCATIONS	42 FAMILIES	10 FAMILIES	9 FAMILIES
	2 BUSINESSES	NONE	1 BUSINESS
FARMS TAKEN	4	NONE	2
PROPERTY TAX LOSS--TOWN--	\$10,075	\$6,865	\$6,670
PROPERTY TAX LOSS--SCHOOLS--	\$15,400	\$8,820	\$7,920

ORAL AND WRITTEN STATEMENTS

Persons may reserve a time to make their oral statements, if they wish, by phoning the I-88 Design Office at (518) 457-7445. Persons may also indicate their desire to speak by filling out registration cards which will be available at the door on the days of the hearing.

Written statements may be introduced for the record at the

hearing, or they may be filed within fourteen days after the date of the hearing with:

Mr. Charles E. Carlson, Regional Director
New York State Department of Transportation
50 Wolf Road
Albany, New York 12205
Attention: Mr. Gerald Perregaux, Project Engineer

EVALUATION PROCESS

The New York State Department of Transportation's (NYSDOT) Environmental Action Plan requires that full exposure be given to a proposed highway project. This is done by direct mail, newspaper advertisements, and information centers where project plans and environmental impact statements are available to the public.

This public hearing is being held to formally present design alternatives for I-88 in Schenectady and Albany Counties. Those attending the hearing will be invited to present their views and comments. A complete stenographic record will be made of all that transpires at the hearing. All written statements received at the hearing

and those mailed up to 14 days afterwards will be included in the official record as an addenda to the public hearing transcript.

After the transcript has been typed, and written statements assembled, copies will be sent to the Federal Highway Administration (FHWA), and NYSDOT's Regional Office. The latter will analyze, evaluate, and summarize views received during and after the hearing, and submit the summary to the FHWA. Based on all studies and inputs during the project's life, NYSDOT will recommend to FHWA one of the design alternatives for further development. FHWA's approval will signal the start of detailed design activities for preparing construction plans.

THE STATE-FEDERAL RELATIONSHIP IN THE FEDERAL-AID HIGHWAY PROGRAM

The United States Department of Transportation's Federal Highway Administration is the principal highway agency of the Federal Government and administers the Federal-aid highway program.

The improvement of Interstate and other Federal-aid highways is financed from the proceeds of federal motor fuel and other excise taxes deposited in the Federal Highway Trust Fund. Grant-in-aid funds for use in highway improvements are then allotted to the states in accordance with formulas that give weight to population, area and postal route mileage; allotments for the Interstate System are based on the relative costs to complete the system.

In the use of Federal-aid for highway construction, the states determine the systems to be improved, the projects to be built, and the design and construction standards to be used. The states are responsible for the planning and design of the facilities. They let the contracts and supervise the construction. When completed, the roads remain under the administrative control of the states which are then responsible for the operation and maintenance of these roads. At appropriate times, the states consult with regional and local agencies, and officials and obtain their approvals as necessary.

Similarly, at specified steps the states consult with, and obtain the approval of, the Federal Highway Administration which acts for the Federal government. Federal-aid procedures provide for two public hearing opportunities during the location planning and design of a project. The "corridor" hearing allows a medium for free and open discussion of alternative general locations. The "design" hearing allows a medium for discussion of alternative specific alignments and major design features.

In New York State, the State Department of Transportation is responsible for highway development in accordance with its Environmental Action Plan and State and Federal Legislation. Funds utilized in highway development come from two sources: the State and the Federal Government. In most cases, State funds are matched with Federal funds on a fixed ratio basis to finance projects located on the Federal-Aid Highway System. Some projects are financed entirely by state funds, since the State's transportation development program is larger than that set by available Federal-aid funds. The Department endeavors to meet Federal regulations for all projects, regardless of the source of funding for a particular project. This is done not only because of a basic agreement with the intent of the Federal regulations, but also to permit the State to utilize whatever Federal funds are made available in the most effective manner.

Not only is the Department concerned with meeting Federal and state regulations, but also carries out a program of continuing coordination with County, Town, and Village officials as well as with interested Federal agencies, State resources, recreation, and planning agencies, local public advisory and civic groups, and interested citizens. Federal regulations require that all projects involving the use of Federal funds must be formally reviewed by State and Area-wide Clearinghouses—the former being the New York State Office of Planning Services and the latter the Capital District Regional Planning Commission, the officially designated regional planning agency. The purpose of this review is to ensure that all viewpoints—national, State, regional, and local—are, to the maximum extent possible, taken into account in planning projects and that the project itself is consistent with and furthers the objectives of comprehensive State, regional and local planning.

AVAILABILITY OF INFORMATION

The Draft Supplemental Environmental Impact Statement and project plans are available for public inspection and copying during business hours at the following locations:

New York State Department of Transportation

Regional Office, 50 Wolf Rd., Albany, N.Y. 12205

Resident Office 3908 Chrysler Ave., Extension,
Schenectady, N.Y. 12303

Resident Office, Main St., Voorheesville, N.Y. 12186

Preliminary Plan Review Bureau, Building 5 — State Campus
1220 Washington Ave., Albany, N.Y. 12232

Federal Highway Administration

Division Office, Leo W. O'Brien Federal Office Building,
Ninth Floor, Clinton Avenue and North Pearl St.,
Albany, N.Y. 12207

Regional Office, 4 Normanskill Boulevard, Delmar, N.Y. 12054

Headquarters, Office of Environmental Policy,
Nasif Building, 400 Seventh Street S.W.,
Washington, D.C. 20024

N.Y.S. Clearinghouse, Office of Planning Services,

488 Broadway, Albany, N.Y. 12227

Area-wide Clearinghouse, Capital District Regional Planning Commission,
Executive Park Tower, Stuyvesant Plaza, Albany, N.Y. 12203

Schenectady County Public Library, Liberty and Clinton Streets,
Schenectady, N.Y. 12301

Duane Branch of the Schenectady County Public Library,
1138 State Street, Schenectady, N.Y. 12304

Wingate Branch of the Schenectady County Public Library,
2558 Guiderland Ave., Schenectady, N.Y. 12306

Duanesburg Office of Town Clerk,
Route 20, Duanesburg, N.Y. 12056

Princeton Office of Town Clerk,
Route 159, Princeton, N.Y. 12306

Rotterdam Office of Town Clerk,
Vinewood Ave., Rotterdam, N.Y. 12306

Guiderland Office of Town Clerk,
Route 20-McCormack's Corners, Guiderland, N.Y. 12084

A limited number of copies of the Draft Supplemental Impact Statement are available to interested groups and individuals. Anyone desiring a copy of the report, additional information about the project, or a tour through the project area should contact Mr. Perregaux by telephone or write to:

Gerald R. Perregaux, Project Engineer
N.Y.S. Department of Transportation
50 Wolf Road
Albany, New York 12205 Telephone: (518) 457-7445

October 17, 1975

Mr. Victor E. Taylor, Division Engineer
Federal Highway Administration
Leo W. O'Brien Federal Building
9th Floor
Clinton Avenue & North Pearl Street
Albany, NY 12207

Re: INTERSTATE ROUTE 508 (I-88)
SCHENECTADY-SCHENECTADY COUNTY
LINE TO THE NEW YORK STATE
THRUWAY (I-90), SCHENECTADY
COUNTY, PIN 1357.01, 1357.02,
1357.03, and 1357.04

Dear Mr. Taylor:

Notices of the combined corridor-design public hearing with respect to this segment of Interstate Route 508 (I-88), were published in the following newspapers: The Knickerbocker News, The Times Union and the Schenectady Gazette on January 23 and February 18, 1975; The Rotterdam Reporter and Cobleskill Times-Journal on January 22 and February 19, 1975; The Altamont Enterprise on January 24 and February 14, 1975. The Notices stated that a combined corridor-design public hearing would be held at Schalmont Senior High School, 825 Duaneburg Road, Rotterdam, New York at 3:00 p.m. and 7:30 p.m. on February 25 and 26, 1975 respectively. The Department also distributed news releases to the newspapers, television and radio stations in the area involved.

Information concerning the economic and social effects of the project, its impact on the environment and its consistency with the goals and objectives of such planning, as have been promulgated by the communities, was available to the public.

I hereby certify that the public hearing was held at the time and location noted above and that persons in the rural areas through or contiguous to whose property the highway will pass and any other interested persons were given an opportunity to express any opinions or comments they had on the proposed locations of this highway.

All material presented at this corridor-design public hearing was duly recorded.

Sincerely,
JAMES E. CARLSON
CHARLES E. CARLSON
CHARLES E. CARLSON
Regional Director



DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

MAILING ADDRESS:
Commander (can)
Third Coast Guard District
Governors Island
New York, New York 10004
(212) 264-8650

3276/3N-039 Normans Kill

JUN 7 1976

Mr. Charles E. Carlson
Regional Director
New York State Department of Transportation
Region 1 Office
50 Wolf Pond
Albany, New York 12205

Dear Mr. Carlson:

Reference is made to the proposed construction of Interstate Route 88, which will cross Normans Kill at one of three alternative sites above Watervliet Reservoir.

We have found no factual support (i.e., no evidence that the stream is subject to tidal influence, no evidence of past or present use or susceptibility for use as a highway for substantial interstate or foreign commerce, and no finding that the stream is capable of improvement at reasonable cost to be used as a highway for substantial interstate or foreign commerce) for the exercise of Coast Guard bridge jurisdiction over Normans Kill upstream of the dam forming the Watervliet Reservoir.

No Coast Guard permit will be required for any of the three proposed alternative I-88 bridge crossings over Normans Kill above Watervliet Reservoir.

Sincerely,

M. W. Hallock

M. W. HALLOCK
Captain, U. S. Coast Guard
Chief, Aids to Navigation Branch
Third Coast Guard District
By direction of the District Commander



DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

JFD
MAILING ADDRESS:
Commander (oan)
Third CG District
Governors Island
New York, N. Y. 10004
(212) 264-8341

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AUG 18 1975

Mr. Robert K. Radliff, Acting Director
Preliminary Plan Review Bureau
New York State Department of Transportation
1220 Washington Avenue
State Campus
Albany, New York 12226

Dear Mr. Radliff:

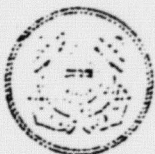
The Third Coast Guard District received the Draft Environmental Impact Statement for Interstate Route 503 (P.I.N. 1357.01--.04) for the Susquehanna Expressway. Originally, comments were due 7 March 1975, however, we were granted an extension of time for comments until 15 June 1975. The Third Coast Guard District regrets that it will not be able to respond until 10 September 1975 due to an unavoidable backlog of navigability determination requests and permit actions. The delay is based upon our request for a legal determination as to our jurisdiction over Normans Kill. We anticipate that our comments will address construction of bridge structures across this waterway.

Very truly yours,

W. C. HEWING
Chief, Bridge Section
Third Coast Guard District
By direction of the District Commander

REC'D. REGION ONE

AUG 26 1975



DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Commander (mep)
Third Coast Guard Dist.
Governors Island
New York, New York 10004
(212) 264-4916

5922/19.b
6 March 1975

MAR 14 REC'D

Mr. Charles E. Carlson
Regional Director
New York State Department of Transportation
Region 1 Office
50 Wolf Road
Albany, New York 12205

Dear Mr. Carlson :

This is in response to Mr. Robert Radliff's letter of 16 January which transmitted the draft supplemental environmental impact statement for Interstate Route 88, from the Schoharie-Schenectady County line to the New York State Thruway in Schenectady and Albany counties.

A review of the statement and attached reports is in progress to evaluate the environmental impact assessment presented. Unfortunately, we are in need of an extension of the "comments due" date, which currently is March 7, 1975. In addition, a determination of whether the Normans Kill is subject to Coast Guard jurisdiction with respect to bridge permit issuance, remains to be made.

We will attempt to submit any comments we might have, as rapidly as they are available.

Yours truly,

Fred Rubel

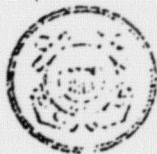
FRED RUBEL

Environmental Protection Administrator
Marine Environmental Protection Branch
By direction of the District Commander

REC'D REGION ONE

MAR 10 1975

Mr. Tolson	
Mr. DeLoach	
Mr. Mohr	
Mr. Bishop	
Mr. Casper	
Mr. Callahan	
Mr. Conrad	
Mr. Felt	
Mr. Gale	
Mr. Rosen	
Mr. Sullivan	
Mr. Tavel	
Mr. Trotter	
Tele. Room	
Miss Holmes	
Miss Gandy	



DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Commander (mop)
Third Coast Guard District
Governors Island
New York, New York 10004
(212) 264-4916

FILE	REC'D. REGION
MAR 21 1975	MAR 21 1975
5922/19.b	1/75
7 2/5	

Robert K. Radliff,
Acting Director
Preliminary Plan Review Bureau
U. S. Department of Transportation
1220 Washington Avenue
State Campus - Albany, New York 12226

Dear Mr. Radliff:

The following concerns the supplemental draft environmental impact statement for Interstate Route 88, from the Schoharie - Schenectady County Line to the New York Thruway in Schenectady and Albany Counties. Comments are generally limited to areas of environmental impact within the jurisdiction of the Coast Guard by law, or by special expertise, as stipulated in the Council on Environmental Quality's Guidelines for the Preparation of Environmental Impact Statements (1 August 1973).

Bridges

A determination of whether the Normans Kill is subject to Coast Guard jurisdiction with respect to the issuance of bridge permits is being undertaken. We will inform you of the findings of this determination after it becomes known. Should sufficient facts exist to indicate "navigability" within the meaning of the law, there will be a need for the project to meet Coast Guard procedural requirements with respect to bridge permit issuance, (which may include additional consideration of environmental impacts). Pending this determination, the following comments are offered.

There are several measures which can be taken to reduce the likelihood of violating the Federal Water Pollution Control Act Amendments of 1972, and minimize adverse impacts on aquatic life and water quality due to the painting of any bridge over the Normans Kill: exercise care; utilize painting techniques which would prevent the introduction of paint into the waterway; install drop cloths; have hay, straw, or other absorbent available so that it can be rapidly deployed to soak up possible spillage; and in the event of spillage, notify the Coast Guard as soon as it occurs.

Water Quality - (Oil Spills)

The discharge of oil and other hazardous materials into waterways caused by tank truck accidents can seriously effect aquatic ecosystems and water supplies. The possibility of such occurrences (although difficult to quantify) should be considered in the statement particularly with regard

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to drainage of high risk road segments.

In addition, there are some items which are outside of the Coast Guard's designated area of functional responsibility which I feel obligated to bring to your attention.

Figure 1. (Volume 3, Part 4), has been interpreted as indicating no trend towards an increase in the average chloride level in the Watervliet Reservoir for the 8 year period preceding January 1974. There may, however, be a trend illustrated in the years 1970-74 toward an increase of the minimum chloride level. This increase was approximately 20mg./l. (from 11 mg. to 31 mg./l.). The existence of any long-term trend is uncertain without data for additional years. Nevertheless, this observation is worthy of recognition and consideration.

Presumably, samples taken from the Watervliet Reservoir were obtained at the surface, or from the intake pipe, 15-20 ft. below the surface. The reservoir's depth was not indicated in the impact statement. The analysis of near bottom samples would assist in determining that higher chloride levels are not accumulating with time in lower strata of the reservoir's waters.

Along with salt contributions from highway surface runoff, street surface runoff of lead has recently received quantitative treatment in the literature (Journal Water Pollution Control Federation, Vol. 45, pp. 999-1000, May 1974). Utilizing the method of calculation presented in the above reference, and assuming: a) a maximum of 25,000 vehicles/day for the project; b) a maximum project length of 17.9 miles; c) that 50% of the lead from exhaust is deposited on the road bed; and d) that 100% of the road bed of the project is in the watershed of the Normans Kill; as much as 14.3 tons/year of lead may be washed into the Normans Kill. The public health implications of additional lead burden to the reservoir by the project, remains to be evaluated in the statement.

Finally, a discussion of the alternative of routing runoff from the Project to a near-by wastewater treatment plant would seem to be appropriate for inclusion into the impact statement.

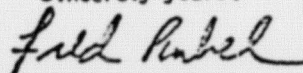
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The above comments are presented to assist you in obtaining a more thorough environmental assessment of the project, and to bring our concerns to your attention.

Sincerely yours,



F. N. RUREL
Environmental Protection Administrator
Marine Environmental Protection Branch
By direction of the District Commander

(5) copies to CEQ
(1) copy to (G-WEP-2/73)

(E)

Communication

Street runoff as a source of lead pollution

C. D. NEWTON, W. W. SHEPARD, AND M. S. COLEMAN

tion of recycle solids to
improve performance.

study was supported by
the EVF of the Environ-
ment Agency.

ert E. Klee and Donald
on, respectively, associ-
professor, Department of
Engineering, University of Con-

A surface water survey conducted by the Oklahoma State Department of Health in the summer of 1972 indicated an excessive amount of lead in the headwaters of the Deep Fork branch of the North Canadian River in Oklahoma County. The lead was not from any specific point source and appeared at excessive levels throughout the area. There was no explanation for this source of lead contamination until publication of a recent report¹ stating that lead from automobile emissions could accumulate on the surface of streets during dry periods and be transported to surface streams during periods of runoff.

The possibility that this source could contribute a significant amount of lead may be seen from the following considerations. Lead is a primary contaminant of automobile emissions and tends to be deposited within a short distance of the roadbed.^{2,3} The highest concentration is deposited on the roadbed, where it tends to remain unadsorbed. A significant concentration of lead would then appear in the runoff (which is essentially complete) from the roadbed. Theoretical and experimental support for this theory is described below.

The headwaters of the Deep Fork are located in the Oklahoma City area. The estimated daily vehicle travel in this area is approximately 1.3 mil miles/day (2.1×10^6 km/day). The average total lead emission rate for automobiles is approximately 0.11 g/mile.⁴ Thus approximately 143,000 g/day of lead are emitted.

The total street area in Oklahoma City is 35,635 acres (14,432 ha), and the average annual rainfall is 52 in. (51.3 cm). Thus, the average daily volume of water draining Oklahoma City streets is 3.175×10^9 l/day.

Automobile emissions are known to deposit lead in large amounts close to the source of emissions.^{1,2} Assuming that 50 percent of the emitted lead is deposited on the roadbed, and 100 percent of the lead on the roadbed is carried in the runoff, the average concentration of lead in the runoff from streets is 0.23 mg/l. This number has units of concentration only. It predicts that the average concentration in several separate occurrences of runoff will be 0.23 mg/l independent of the particular conditions prevailing during a particular runoff. The only condition necessary for it to be valid for a particular runoff is that the total amount of rainfall received divided by the number of days since the previous runoff must be equal to the average daily rainfall. For the Oklahoma City area the average daily rainfall is 0.0577 in/day (0.223 cm/day).

Even if the theoretical value of 0.23 mg/l is in error by a factor of 2 or more, it is still significant. Local values may vary by a factor of 5 or more depending on traffic volume and other conditions. An experimental value in Tulsa, Oklahoma, (a similar size city 100 miles distant) was approximately 0.2 mg/l.

A value of 0.23 mg/l in runoff from streets would contribute 0.13 mg/l in the total runoff. This is derived as follows: The average runoff of precipitation over the entire area is 12.5 percent of the total precipitation.⁵ However, 7.15 percent of the area is street surface. Because runoff from streets is essentially complete, about 57 percent of the total runoff consists of street runoff. Assuming that nonstreet runoff contributes no lead contamination (soil rapidly adsorbs lead), the concentration of lead after dilution into the total runoff would be 0.13 mg/l.

COMMUNICATION

In order to test this theory experimentally, advantage was taken of a winter storm that left a layer of snow approximately 5 in. (12.7 cm) deep and resulted in below freezing temperatures for about 6 days. As deposits were held in suspension during this period, it was felt that snow, ice, and water samples taken from roadbed surfaces and adjacent areas would provide an opportunity for study with a minimum amount of unknown interferences. Accordingly, samples of snow, ice, and water were taken at several sites in or near heavily traveled streets and highways as the temperatures rose above freezing. The concentration of lead in the melted samples was measured, after acid digestion, using an atomic absorption spectrophotometer.

The following results were obtained: The average concentration of lead in samples taken in the edge of a roadbed was 5.5 mg/l, with a range of 3.6 to 8.5 mg/l. Concentration of lead in samples taken at points away from the roadbed decreased with increasing distance from the roadbed. The lowest concentration of lead found was 0.09 mg/l in a sample taken in an open field surrounded on three sides by heavily traveled streets.

In order to compare the experimental values with the theoretical value, it is necessary to recall that the theoretical value is based on average rainfall that amounts to 0.655 in./day (0.223 cm/day). The total equivalent rainfall during the experiment was 0.41 in. (1.0 cm). The total number of days from the last previous runoff to the time of sampling was 5 days. Thus the effective average daily precipitation was 0.051 in./day (0.13 cm/day). Correcting the experimentally observed concentration to account for the smaller than average rainfall gives 3.2 mg/l.

These data clearly indicate a significant amount of lead in runoff from streets. In

fact, the amounts found were higher than anticipated. One reason for the unexpectedly high values is that whereas the theoretical value of 0.23 mg/l is an average number for the entire area, sample site selections were prejudiced toward streets with a high traffic volume. Another possibility is that the previous runoff did not completely wash the street surface. On the other hand, traffic volume was probably lower than normal because of the inclement weather; thus the true average value may be higher than the observed value. Wide variations are to be expected in local areas depending on the volume of traffic, type of traffic, and speed of vehicles.

Both the theoretical and experimental values are sufficiently large to indicate that street runoff can be a significant non-point source of lead contamination of surface water. Further study is needed on traffic volume, average traffic speed, amount of surfaced land area relative to the amount of nonsurfaced land area, average concentration of lead in emission from the vehicles under various conditions, and other factors to predict total amounts of lead expected to be contained in the runoff from a particular area.

ACKNOWLEDGEMENTS

Authors. The authors are associated with the Water Quality Control Service of the Oklahoma Department of Health, Oklahoma City, Oklahoma.

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2. "Water Pollution Aspects of Street Surface Contaminants." Rept. R2-72-081, EPA, Washington, D. C. (1972).
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4. "Oklahoma's Water Resources." Publ. No. 30, Oklahoma Water Resources Board, Oklahoma City (1970).

HIGH-RATE LAND TREATMENT II: INFILTRATION AND
HYDRAULIC ASPECTS OF THE FLUSHING
MEADOWS PROJECT

H. Bower, R. C. Bice, E. D. Emery

THE HISTORICAL DEVELOPMENT OF WATER
POLLUTION: COST-OF-CONTROL FUNCTIONS

D. P. Tarkenton

Env. & Water Poll. Control Fed. 46, 813 (1974)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SANE TRANSPORTATION-
N. Y. STATE COST, TOWN OF ROTTERDAM, TOWN OF PRINCETOWN,
ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERT,
CHESTER AND JANE SNYDER, JOHN K. and
MARY E. ALDERSHOFF and GARRETT J. and DELLA M.
ANDERSHOFF, WILLIAM F. and ILMA SCHULTZE,
ARTHUR W. and JANICE SCOTT, ROBERT G. and
MARY LOU SAWYER, and DANIEL T. and DORIS SEIP,

Plaintiffs,

-vs-

JOHN A. VOLPE, Secretary of Transportation of
the United States;
GERALD D. LOVE, Regional Federal Highway Administrator
of the Bureau of Public Roads, United States Department
of Transportation;
ROBERT E. KIRBY, Division Engineer of the Bureau of
Public Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the Department of
Transportation of the State of New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individually
as well as in his designated official capacity,

Defendants.

CIVIL NO.
72-CV-254

SUPPLEMENTAL
AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

WILLIAM A. NOSTRAND, Jr., being duly sworn, deposes and says:

1. I am the Director of the Office of Environment and Design, Region 1,
Federal Highway Administration (FHWA), of the United States Department of
Transportation.

2. I make this affidavit as a supplement to my affidavit of June 14,
1976, which was filed with this Court on that date. I hereby reiterate all of
the statements contained in my June 14, 1976 affidavit and reaffirm that the
FHWA environmental review processes described therein apply to the entire
I-88 project, inclusive of that portion from the Schenectady/Schoharie Line
to the terminus of the I-88 project at the New York State Thruway (I-90)
(hereafter referred to as the "Capital District Project.")

3. My June 14, 1976 affidavit describes and documents the in-depth FHWA participation and guidance in the project development and environmental evaluation processes, required by NEPA and FHWA regulations, for the portion of I-88 from Oneonta east to the Schenectady/Schoharie line, (PIN's 9357.08 through 9357.17). It also documents FHWA's involvement in the environmental evaluation of the whole of I-88 as presented in the comprehensive environmental impact statement adopted and forwarded to the Council on Environmental Quality on February 13, 1976, which evaluates the overall affects of the entire 123 mile I-88 project on the State and the various localities it traverses. The administrative record of the FHWA participation and guidance in these environmental study processes is included as Exhibits A-G of the June 14, 1976 affidavit.

4. This supplemental affidavit describes and documents FHWA's additional substantial guidance and participation in the environmental evaluation studies and project development processes for the 18-mile Capital District project portion of the I-88 project.

5. The administrative record documenting this FHWA environmental study participation and guidance and project involvement in the Capital District project is presented herein as Exhibit H, which contains a chronological listing of the administrative record on this project. The individual documents included in Exhibit H are numbered in chronological order as H-1, H-2, etc. Where appropriate, documents of substantial volume are not included in toto.

6. The information presented below, as to the Capital District project, is based upon the FHWA records and file material in Exhibit H, and on the records and files of the Region I and New York Division Offices of FHWA, on the knowledge of Region I and New York Division staff, and upon my information and belief.

7. The FHWA project involvement with the Capital District project began prior to the National Environmental Policy Act, as did FHWA participation in the entire I-88 project. However, subsequent to the National Environmental Policy Act's enactment, the Capital District project developed and progressed in accordance with FHWA's rules and regulations implementing the National Environmental Policy Act, which were in effect at the time each project action was taken.

8. The particulars of FHWA Involvement in the Capital District project begin with the participation of the FHWA New York Division area engineer assigned to the Capital District project area. This FHWA Division office type of participation is described in paragraphs 32-37 of my June 14, 1976 affidavit and is equally applicable to the Capital District project.

9. Specifically, FHWA environmental evaluation of the Capital District project, documented as early as January 29, 1970, shows FHWA was concerned about the possibility of the Capital District project having adverse effects on local sites of historic value and coordinated with the State as to avoidance of such areas. (Exhibit H-1, H-2).

10. FHWA was involved in the public hearing process and the presentation of alternate locations for the Capital District project at a public hearing on May 27, 1970. FHWA attended and made an evaluation of the public response on historic and sensitive areas affected. (Exhibit H-3). In addition, subsequent formal evaluations and approval of the hearing procedures, as meeting FHWA requirements for public participation, were made by FHWA. (Exhibit H-7, H-8).

11. On June 9, 1970, FHWA and State personnel, in the interests of keeping the public informed, met with Congressman Stratton and members of the public to discuss alternate locations for the Capital District project and their related problems. (Exhibit H-6).

12. On September 22, 1970, the FHWA Regional Administrator attended an informal hearing with 300 attendees regarding the location of the Capital District project and listened to varying views as to the Capital District project and explained FHWA's position. (Exhibit H-9)

13. FHWA personnel also were involved during October, 1970 in providing information for and evaluating the results of a graduate student study of the factors which should be considered for evaluating the Capital District project locations. (Exhibit H-10)

14. FHWA was notified on February 22, 1971 that the State Clearinghouse procedures had been followed on the Capital District project and that no Clearinghouse agencies objected to the Capital District project as presented. (Exhibit H-11) Subsequently FHWA approved on November 16, 1971, the

Metropolitan Clearinghouse procedures as to local agency response. This process had involved an information meeting between the State and local planning agencies in addition to seeking local agency comment on the Capital District project. (Exhibit H-22, H-23)

15. The specifics of FHWA formal National Environmental Policy Act Involvement were conducted in accordance with FHWA's Interim National Environmental Policy Act Guidelines dated November 24, 1970, and the State submitted to FHWA on July 1, 1971 a draft Environmental Impact Statement for FHWA's input and approval. (Exhibit H-12 and H-13)

16. After a study of the document by FHWA staff, the Regional Office found the draft Environmental Impact Statement/4(f) satisfactory, (Exhibit H-14); the Division Office required additional air pollution data and that a FHWA outline on "Environmental Design Factors, FHWA-Region One," be used as a guide. (Exhibit H-15). The Washington Office needed additional time to provide input (Exhibit H-16) and later on September 21, 1971, requested additional data as to noise abatement measures and aesthetic protection as well as consideration of alternate locations. (Exhibit H-20)

17. On September 3, 1971, the State requested location approval for the Capital District project, based on its location report evaluating the overall social, economic and environmental effects of the alternate locations studied. The State based its request also upon documentation of its National Environmental Policy Act environmental study process and certified the adequacy of its public hearing procedures on the Capital District project. (Exhibit H-17). The State's documentation had been studied and evaluated by FHWA in the field even prior to this request with consideration given to the desires of the public and potential alternate locations. (Exhibit H-18). The Washington Office of FHWA was also involved in evaluating the location study. (Exhibit H-21).

18. During this time period FHWA was continually involved with the State in the ongoing project studies, evaluations and project developments, which involved requests for information - for example, an investigation into State survey activities on the project due to concern by a citizen that the survey activities might be for the purpose of designing on an already selected location. (Exhibit H-24, H-28, H-29 and H-30). There was also FHWA attendance at informational meetings with government officials and the public (H-25).

19. This coordination and indepth involvement in location considerations continued throughout the NEPA study process and on November 29, 1971, the State submitted to FHWA an advance copy of the final Environmental Impact Statement (FEIS) and 4(f) Statement for the Capital District project, so as to obtain early input from FHWA, (Exhibit H-26) and subsequently submitted the formal printed FEIS to FHWA for acceptance. (Exhibit H-27)

20. After thoroughly reviewing the FEIS/4(f), the FHWA Division Staff found it to be an adequate environmental evaluation of the Capital District project which provided satisfactory evaluation and study of the public's comments, as well as those environmental comments received from governmental agencies. However, the Division Office wanted a broader location corridor considered, with additional alternate interchanges studied in the design phase of the project (Exhibit H-31).

21. Therefore, on January 10, 1972 a meeting between State and FHWA personnel was held to discuss revisions to the FEIS/4(f), and the State agreed to modify the FEIS/4(f) to include studies and evaluations of alternate termini for the Capital District project. (Exhibit H-32 and H-35)

22. FHWA involvement in the environmental evaluation process continued during February, 1972 with evaluation of FEIS relocation data, determinations as to potential 4(f) involvement in the Capital District project area and included responses to questions of the public on the FEIS/4(f). (Exhibit H-33, H-34, H-36 and H-37)

23. On March 27, 1972, the State transmitted its revised FEIS/4(f) which included the additional terminus study and data required by FHWA. (Exhibit H-38)

24. On March 30, 1972 the FHWA Division Office notified the FHWA Regional Office that the revised FEIS/4(f) satisfies FHWA's previous directives to the State and determined that inclusion of various other data is not necessary. (Exhibit H-39). The Regional Office concurred, after a thorough review of the document and transmitted it to the FHWA Washington Office for review with high praise for the quality of the document. (Exhibit H-40)

25. This revised final EIS/4(f) for the Capital District project was subsequently studied, reviewed and accepted by the FHWA Washington Office staff, the Office of the Secretary of the U. S. Department of Transportation, and transmitted to the Council on Environmental Quality on June 20, 1972, and made available to the public. (Exhibit H-42 - H-45)

26. The FHWA Division, Region and Washington Offices' NEPA review processes are described in-depth in my June 14, 1976 affidavit in paragraphs 15 through 28, and are applicable to the Capital District project environmental studies and evaluations referred to in this affidavit.

27. In reliance upon completion of the FEIS, on October 3, 1972, the State made a modified request for location approval and stated it was conducting additional studies on alternate termini for the Capital District project, as had been stated in the FEIS/4(f). It further stated it had expanded its corridor considerations to include the alternate Thruway connections FHWA had requested be studied. (Exhibit H-46)

28. However, on October 18, 1972, FHWA only gave location approval from the Schenectady/Schoharie County line terminus of the Capital District project to the Route 20 portion of it, and directed that additional study of the portion continuing on to the Thruway terminus be done. FHWA also wanted considered the results of a supplemental hearing to be held on these alternate termini locations, since the public interest in the Capital District project was very high. (Exhibit H-47).

29. A supplemental hearing was held on January 23, 1973 on the new termini locations. It was attended by FHWA staff and was subsequently evaluated formally pursuant to the State's renewed request to FHWA for location approval on the Capital District project. The result was that, following an evaluation of the public comment and environmental problems involved in the Capital District project, FHWA, on October 18, 1973 directed the State to prepare a supplemental Draft EIS to evaluate the environmental effects of the additional project termini presented at the supplemental hearing. FHWA also required the State to hold a future combined location/design hearing on these newly-presented alternates. (Exhibit H-48 - H-51).

30. The intensive study involved and the preparation of the supplemental EIS for the Capital District project was carried out with indepth coordination between FHWA and the State during the entire year of 1974. This participation included FHWA comments, critique, and input on environmental aspects of the project, meetings between State and FHWA personnel on the Draft of the Supplemental EIS, a comprehensive review of the preliminary draft material by FHWA, as well as a continuing review and direction of the State's activities as to the EIS studies. This FHWA participation was in-depth and continuing. The administrative record presented here makes it clear that there was substantial participation and guidance by FHWA in the environmental evaluation and NEPA processes conducted on the Capital District project. It also documents the State's ready cooperation

with and responsiveness to the FHWA direction and participation in the NEPA process. (Exhibit H-52 - H-58).

31. In particular, Exhibit H-56 documents the input of FHWA into the preliminary draft of the supplemental EIS. It shows FHWA contributed data and concepts regarding relocation studies, air pollution, water supplies, need for abatement of adverse construction effects, noise abatement measures, aesthetics, etc.

32. Exhibit H-57 documents FHWA's informal comments at a meeting as to the draft EIS content and includes FHWA's recommendation that the Draft Supplemental EIS be accepted by FHWA. This exhibit also contains the State's formal response to FHWA's detailed input and comments on the Draft Supplemental EIS as included in Exhibit H-56, November 13, 1974, and evidences the fine State response to FHWA's guidance.

33. In addition, a FHWA-State meeting was held on January 15, 1975 wherein the FHWA Division staff attending informally approved the changes made in the Draft Supplemental EIS as detailed in the attached memorandum of December 13, 1974, showing the specifics of the State's revision of pages in the Draft pursuant to FHWA input and comment. (Exhibit H-58)

34. On January 15, 1975 the State formally transmitted to FHWA the Draft Supplemental EIS for review, acceptance and appropriate distribution, including to the Council on Environmental Quality. (Exhibit H-59).

35. This Draft Supplemental EIS was also distributed for review to the FHWA Regional and Washington Office for review, as well as to the Office of the Secretary of the U. S. Department of Transportation, each of which did a comprehensive review of the document and each of which provided input to the State for inclusion in the Final EIS. (Exhibit H-60-H-63) (See Para. 26, Supra.)

36. These FHWA review comments were transmitted to the State on April 22, 1975 (with comments from the Environmental Protection Agency and the Department of the Interior, also) and lists the requirements for the final document as: additional study and consideration of historic sites; evidence of compliance with the Advisory Council's requirements as to historic sites; inclusion of a noise abatement study summary; modifications and clarifications of various data contained in the Draft; requirements that minimization of various adverse

environmental effects be contained in the final Supplemental EIS; coordination with other government agencies having specific environmental expertise; inclusion of socio-economic data regarding relocated families; opinions are challenged and require a technical basis be presented; requirement that questionable data be deleted and not relied upon; flood plain data is required as is data as to land acquisition procedures, and more detailed discussion of effects on local communities, etc. (Exhibit H-63).

37. FHWA concurrently evaluated and reviewed the State and Areawide Clearinghouse procedures followed by the State, as well as the public hearing input from the supplemental public hearings held on February 25 and 26th, 1975 for the Capital District project as required by FHWA. (Exhibit H-64 and H-65).

38. On November 6, 1975, the State submitted to the FHWA office for approval and acceptance, the Final Supplemental Environmental Impact Statement (FSEIS) and related project data showing Design alternate 25 1/2 as the favored alternative. (Exhibit H-66).

39. On December 3, 1975, the FHWA Division Office transmitted the FSEIS to the FHWA Regional Office for approval and acceptance following review. This transmittal included a summary report documenting the FHWA guidance and participation as evidenced by FHWA's input commentary with the specific resulting response data in the FSEIS. Also, delineated is the response to the Environmental Protection Agency and Department of the Interior's comments which had been specifically attached to the FHWA commentary sent to the State on the Supplemental Draft EIS. (Exhibit H-67)

40. In addition, Exhibit H-67 contains review letters of agencies and the public as to the Draft Supplemental EIS, including that of the Sierra Club dated February 25, 1975 which, while expressing opposition to the concept of the proposed I-88 project, also stated that the Draft Supplemental EIS".... is an unusually well-balanced and clearly presented analysis of the proposed corridors for I-88 in Schenectady County, and the justification for the construction of I-88 as a whole."

41. On January 8, 1976, the FHWA Regional Office transmitted the FSEIS to the FHWA Washington Office for review and approval acceptance, stating that the Regional Interdisciplinary Task Force had reviewed it and found it to be in compliance with the requirements of the National Environmental Policy Act and FHWA implementing regulations. (Exhibit H-68)

42. On March 23, 1976, the FHWA Division Office informed the State that a summary report of the environmental commitments in the FSEIS were necessary prior to any further FHWA action on the Capital District project. (Exhibit H-69)

43. On June 11, 1976, the Office of the Secretary of the U.S. Department of Transportation in a memorandum to the FHWA Regional Administrator of Region I forwarded its section 4(f) review of the Capital District project and in an excellent factual presentation, concluded that there is no feasible and prudent alternative to the use of 4(f) land for the Capital District project, and that all steps have been taken to minimize harm. It discusses alternatives, historic sites and provides a comprehensive summary of the project history. (Exhibit H-70)

44. On June 14, 1976, the FHWA Regional Office transmitted to the FHWA Division Office the formal FHWA approval and acceptance of the FSEIS as a FHWA document and simultaneously transmitted the approved FSEIS to CEQ. (Exhibit H-71)

45. On June 15, 1976, the FHWA Division Administrator notified the State that the FSEIS had been adopted formally by FHWA, and that it should now be made available to the public and appropriate agencies for comment, which the State subsequently did by publishing a notice in local area newspapers with a general circulation. (Exhibit H-72).

46. Based on the above referenced documents and my knowledge of the process through which the Capital District Project has progressed, the participation and guidance furnished by the FHWA adequately complies with the requirements of the National Environmental Policy Act as amended and FHWA implementing regulations. Thus, FHWA can adopt and take responsibility for the validity, scope and direction of the Final EIS for the Capital District project in that it adequately evaluates the social, economic and environmental effects of the proposed route, and reflects the combined input of the State and FHWA in the NEPA process.

William C. [Signature]

Sworn to before me this

6 day of August 1976

S/ Mary J. Franklin
J. Comm. exp

2/12/77

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CAPITAL REGION CITIZENS COMMITTEE,	:	
et al.,	:	Civil Action
	:	72-CV-254
Plaintiffs,	:	
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
JOHN A. VOLPE, Secretary of Transportation	:	
of the United States, et al.,	:	
Defendants.	:	

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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WILLIAM HOPPEN, being duly sworn, deposes and says:

That he is attorney for The Richmondville Property Owners Committee and New York State Coalition for Sane Transportation, and makes this affidavit in answer to the affidavits of Douglas S. Dales, Jr., dated July 22, 1976, and of Raymond T. Schuler, dated July 27, 1976; and the affidavit and supplemental affidavits of William A. Nostrand, Jr., dated respectively June 14, and August 6, 1976. This affidavit is submitted in supplement to the prior affidavits of affiant, dated June 7, 8, 11, 1976, respectively, the affirmation of Charles Masterton of June 1976, and the affidavit of Dorothy L. Rosenthal, dated June 13, 1976; and the record upon the motions for summary judgment originally submitted and denied, the motion for preliminary injunction granted by the Memorandum-Decision and Order dated November 14, 1973, and the record of this case subsequent thereto.

The State defendants prior moved, by motion dated April 16, 1976, to modify the Memorandum-Decision and Order of November 14, 1973, to permit Federal participation in funding of projects PINs 9357.08 through 9357.17 in Otsego and Schoharie Counties. At a hearing on that motion, on June 28, 1976, in Utica, it was directed that the defendants file the additional materials necessary to establish compliance with Federal law with regard to certain segments of the highway in the Town of Fenton and in Schenectady County, and that any motions proposed to be brought on before the Court at the same time for consolidated consideration in terms of the relief requested and the legal questions raised with reference to the I-88 project.

The State defendants, movants herein, have reported that the documentation for the segment from I-81 to Port Crane, in Broome County (Town of Fenton) will not be available for about one year; they have appended documentation for four segments (PINs 1357.01-1357.04) in Schenectady County. At the same time they have renewed their motion to permit Federal participation in funding of projects in Otsego and Schoharie Counties (PINs 9357.08-9357.17), they have broadened their motion to include the four segments in Schenectady County; or, in the alternative, have asked for summary judgment in defendants' favor dismissing the complaint with regard to such segments.

This affidavit will not repeat the materials above referenced with regard to the prior affidavits and exhibits, including the entire record in the case, except to relate them to the somewhat broadened scope of the current requested relief;

and to consider, in particular, issues of alleged non-compliance with the requirements of Public Law 94-83, with respect to procedures required to be followed by Federal law in connection with environmental reporting, including consideration of alternatives.

By Public Law 94-83, effective August 9, 1975, a new subparagraph "(D)" was added to Section 102(2) of the National Environmental Policy Act in order to clarify procedures with respect to the preparation of environmental impact statements, the substance of which, as heretofore reviewed, being that a statement required under Section 102(2)(C) of the Act was not to be deemed legally insufficient solely by reason of having been prepared by a State agency or official, if (i) the State agency or official had statewide jurisdiction and had the responsibility for such action, (ii) the responsible Federal official furnished guidance and participated in such participation, (iii) the responsible Federal official independently evaluated such statement prior to its approval and adoption, and (iv) subject to the provision that the procedures in this subparagraph did not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under the National Environmental Policy Act.

A review of the legislative history reaffirms the Congressional intent, if this explicit statutory language is not sufficient in this regard, of continued Federal responsibility in the environmental reporting process under the Act. In particular, in defining the procedures required, Senate Report No. 94-52, inso-

far as here applicable, reported in part as follows (pp. 9-10; U.S. Cong. & Admin. News, 94th Cong., 1st Sess., 1975, pp. 867-868):

"(T)he Committee, in its amendment in the nature of a substitute added the following italicized words to those originally found in H.R. 3130, as passed the House: "(A) statement prepared after January 1, 1970, on a major Federal action funded under a program of grants to states . . . by a state agency or official which or who has statewide jurisdiction and has the principal planning and decisionmaking responsibility for such action . . ."

"H.R. 3130, as passed the House, and H.R. 3130, as ordered reported by the Committee, have virtually identical language to assure Federal agency compliance with all the requirements contained in section 102(2)(C) of NEPA, the only provision of the law to which the legislation applies. The House Merchant Marine and Fisheries Committee described the limited delegation permitted, and the full retention of ultimate Federal responsibility required, by H.R. 3130, as follows:

" . . . (T)he bill by no means provides carte blanche to highway construction programs. It does not sanction a 'rubber stamp' approach to Federal responsibilities, nor does it allow Federal functionaries to sidestep the other responsibilities placed upon them by law including, but not limited to, NEPA. What it does is to encourage adequate inputs of information by those best suited to develop that information, and to ensure that a continuing Federal presence is mandated to fit that information into a rational and realistic decisionmaking process. If enacted, H.R. 3130 would have this and only this, effect.

"As the Committee has made no change in the language of H.R. 3130, as passed the House, upon which the statement in the House Committee's report is based, the Committee concurs in the statement."

* * *

The words "principal planning and decisionmaking" referred to above and which appeared in the Senate amendment to H.R. 3130 were omitted in conference on the basis that this was unnecessary in light of the legislative history of H.R. 3130 and of the retention of the requirement contained in the Senate amendment that the State agency or official have the "responsibility for such action" (House Conf. Rep. No. 94-388, p. 4; U.S. Cong. & Admin. News, 94th Cong., 1st Sess., 1975, supra, p. 880).

A brief review of the procedures herein followed will establish failure of the defendants to have complied with the requirements of the National Environmental Policy Act and of Public Law 94-83, above referenced. In his affidavit of April 12, 1976, Commissioner Schuler reported in part as follows (Affid. of Schuler, Apr. 12, 1976, p. 6, et seq.):

"The impact statement for I-88 containing the 'Comprehensive Statement of Environmental Considerations from Binghamton to the Capital District' was prepared by the New York State Department of Transportation based upon the report and studies of the Department's consultant. The consultant did submit the various portions of the Draft Environmental Impact Statement to NYSDOT and FHWA during the progress of his studies. These draft statements were reviewed and added to by NYSDOT and FHWA. This statement was prepared in accordance with the appropriate rules and regulations in effect at the time of preparation. A brief chronology * * * is as follows:

"February 20, 1974 - FHWA and NYSDOT jointly established requirements and scope of services for the consultant.

"FHWA approved the consultant agreement which became effective May 1, 1974.

* * *

(p. 7)

"June 12 & 14, 1974 - Progress meetings with consultant which were attended and participated in by both the FHWA Area Engineer and the FHWA District Engineer.

* * *

"September 12, 1974 - Progress meeting attended by consultant and representatives of NYSDOT and FHWA.

"October 17, 1974 - Meeting to review air quality segment of proposed Draft Environmental Impact Statement, attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA.

"October 30, 1974 - Meeting between consultant, NYSDOT and FHWA to review progress on proposed Draft Environmental Impact Statement.

* * *

"January 9, 1975 - Meeting on air and noise segment attended by consultant, subcontractor to consultant, NYSDOT and FHWA Area Engineer.

* * *

"March 7, 1975 - Air report meeting attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA.

* * *

"April 14, 1975 - Meeting on air quality modeling attended by consultant, subcontractor to consultant, NYSDOT and representatives of FHWA."

* * *

On information and belief, although the name thereof does not appear in the moving papers of the State defendants, the so-called "Comprehensive Statement of environmental considerations from Binghamton to the Capital District" (Final Environmental Impact Statement, Interstate Route 88 (The Susquehanna Expressway)), dated October 9, 1975, and approved by the Regional Federal Highway Administrator on February 13, 1976 (Affidavit of Schuler, Dec. 11, 1975, para. 17, et seq.), upon which

reliance is had herein to establish compliance with the National Environmental Policy Act, as amended, in accordance with the terms of Public Law 94-83 (42 U.S.C., Sec. 4332(D); see Affid. of Dales, Apr. 16, 1976, para. 2, et seq.; Affid. of Schuler, Apr. 12, 1976, para. 9(a), p. 5, et seq.; Affid. of Schuler, July 27, 1976, para. 6), was not prepared, as required by law by a "State agency or official" who had "statewide jurisdiction" and "the responsibility for such action", but by a consultant.

Apart from the substantive deficiencies in terms of reporting of the so-called "final environmental impact statement", thus prepared, it is apparent that the failure of the defendants to have followed the requirements of law in the reporting process, including compliance with the requirements of Public Law 94-83, are directly related to its deficiencies in terms of scope, objectivity, and content which remain a Federal responsibility under the Public Law and which have been ignored, particularly in terms of planning for and report upon alternatives to the proposed action.

By separate affidavit some of the deficiencies of the so-called final statement, and of selected segmented reports, will be reviewed, with particular reference to the alleged failure of defendants to have complied with the reporting requirements of the National Environmental Policy Act of 1969, including Public Law 94-83.

Sworn to before me this
9th day of September, 1976.

Lora Lee Gunn
Notary Public

William Hoppen
William Hoppen

LORA LEE GUNN
Notary Public, State of New York
No. 31-1604925
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CAPITAL REGION CITIZENS COMMITTEE,	:	
et al.,	:	Civil Action
	:	72-CV-254
Plaintiffs,	:	
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
JOHN A. VOLPE, Secretary of Transportation	:	
of the United States, et al.,	:	
Defendants.	:	

-----x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

BRIAN T. KETCHAM, being duly sworn, deposes and says that he is a Professional Engineer, and Staff Engineer for Citizens for Clean Air, Inc. His professional qualifications are attached hereto as an exhibit.

This affidavit is submitted in connection with a motion by the State defendants to modify the Memorandum-Decision and Order of November 14, 1973, to permit Federal participation in funding of projects PINs 9357.08 through 9357.17, in Otsego and Schoharie Counties and for other relief; all with particular reference, as hereinafter indicated, to the extent of compliance by the State defendants with the requirements of reporting under the National Environmental Policy Act of 1969 with regard to the project's impact on air quality, with respect to

noise, and other required aspects of report, including alternatives to the proposed action, and energy.

In connection with the opinion herein given, affiant has examined the relevant portions of the following designated documents and reports:

Final Environmental Impact Statement, Interstate Route 88 (The Susquehanna Expressway), Comprehensive Statement of environmental considerations from Binghamton to the Capital District, United States Department of Transportation, Federal Highway Administration, New York State Department of Transportation, Raymond T. Schuler, Commissioner, dated Oct. 9, 1975, approved for Regional Federal Highway Administrator Feb. 13, 1976, pp. i-xxx, CS-1 - CS-82, with appended prior correspondence, with Appendices 3 thru 9;

Department of Transportation, Federal Highway Administration, Prepared by New York State Department of Transportation, Final Environmental/Section 4(f) Statement, Administrative Action for The Susquehanna Expressway, Interstate Route 88, Oneonta to the Schoharie-Schenectady County Line, Otsego and Schoharie Counties, dated July 31, 1972 - Exhibit 133; and

Final Supplemental Environmental Impact Statement and Final Determination Pursuant to 49 USC 1653(f), 42 USC 4332(2)(C), 16 USC 470(f), Interstate Route 88, Schoharie-Schenectady County Line to N.Y.S. Thruway (I-90), Schenectady County, dated October 10, 1975, approved by Regional Federal Highway Administrator June 14, 1976, and Technical Studies, Parts 2 and 3 appended thereto - Appendix B.

No examination was made of the report with regard to the Project from Sanitaria Springs to the Broome-Chenango County line portion and the Oneonta Bypass portion thereof, since not involved in the instant motion. Likewise, comment is deferred with respect to Appendix No. 1, with reference to air quality, and Appendix No. 2, with reference to noise, stated to have been prepared with reference to the comprehensive statement, but apparently not included

as part of the moving papers. The foregoing reports, including the so-called comprehensive statement, are taken to be representative of if not better in some respects in terms of the quality of reporting to be found in the other segmented reports with reference to the Project and, subject to further and particular examination of the deficiencies of such other statements, will suffice to establish the general failure of the State, in the following described respects, to have complied with the reporting requirements of the National Environmental Policy Act.

Air Quality

The so-called Final Environmental Impact Statement, in the form of the "Comprehensive Statement" of environmental considerations from Binghamton to the Capital District, referred to above, has concluded that ambient carbon monoxide levels within the corridor under consideration will never exceed Federal standards (CS-34 - CS-40). The Statement does indicate, however, that hydrocarbon and nitrogen oxide levels may increase (substantially, indeed, for nitrogen oxide) but does not attempt to predict impact on oxidants due to "the absence of scientific knowledge" regarding predictive capability for the specific pollutant.

Although Appendix No. 1 was not available for review, not having been included in the moving papers, there is every indication that the air quality analysis summarized in the so-called Comprehensive Statement, at least for Projects PINs 9357.08 through 9357.17, was in fact done in 1972 and thus does not reflect state-of-the-art analytic capabilities; it certainly does

Air Quality, cont.

not reflect the latest U.S. Environmental Protection Agency mobile source guidelines for predicting mobile source emissions (Supplement No. 5), available to the State defendants for nearly a year and a half, now.

Of perhaps greatest importance in this regard is the requirement of Supplement No. 5, in air quality reporting, that worst-case conditions be reported for all automotive pollutants. Worst-case reporting would assume, for example, the meteorological conditions that would yield the greatest impact on local air pollution problems. This would include low temperatures (20°-30° F.), a thermal inversion, and the worst possible traffic congestion. These assumptions alone can increase carbon monoxide (CO) emissions along the highway by upward of at least ten times that predicted. There is every likelihood that carbon monoxide standards, in certain parts of the project, would be exceeded under these worst-case conditions.

These comments are directed particularly to the adequacy of the so-called "Comprehensive Statement", which has undertaken to report on the entire corridor in asserted compliance with the requirements of Federal law. It is noted, in passing, that worst-case reporting was professed in the separate supplemental statement for the four segments in Schenectady County (PINs 1357.01-1357.04); even there, the State failed to include elements necessary to such worst-case reporting, and did not use the more stringent reporting requirements of Supplement No. 5 itself.

There is an even greater likelihood that hydrocarbon (HC), nitrogen oxide (NOx), and oxidant standards would be great-

Air Quality, cont.

ly exceeded given the prediction in the Statement of such pollutant levels either exceeding, on an annual average basis, current air quality standards; or reaching levels closely approaching such air quality standards, leaving little margin for error.

In addition to the State defendants' failure to assume worst-case reporting for the project as a whole, and to have used the E.P.A.'s more stringent Supplement No. 5, the Statement has assumed that automobile emission standards will be implemented as applicable to new cars; and, further, that this will be done in accordance with the schedule therefor provided by the authority of the Clean Air Amendments of 1970. This is a further failure in terms of air quality reporting in that automobile emission compliance deadlines for new cars have not in fact been met, and such deadlines have already been extended for three years by the Environmental Protection Agency itself and the Congress, and there is every indication that further extension or extensions will be granted the industry, with consequent recomputation of expected air pollution levels along the new highway required.

Further, apart from the lag of Congress and the Environmental Protection Agency in requiring the automotive industry to make clean cars, there is growing evidence, on the basis of administrative reports and field tests in American cities that automotive emission controls on new automobiles are not as effective as originally believed, and on the basis of which report has been made. This is especially true if emission inspection and vehicle maintenance programs are not undertaken - such have not yet been undertaken by the State and, in any event, are not even planned for the

Air Quality, cont.

major part of the subject corridor.

Both of the foregoing factors will increase substantially the air quality impact of the proposed construction, and constitute further element of inadequacy in the project's air quality reporting.

The Statement also cites the State Air Quality Implementation Plan (SIP) of 1973 in support of the conclusion that the project will have no significant auto pollution impact. The SIP, in fact, is largely a stationary sources plan. It was prepared in 1972, at a time when much air quality data was either not available or was inadequate. Again, the SIP in question was not designed to relate to automotive pollution problems, which were considered in 1972 to be a problem only in large urban centers, an assumption based on the naive belief that auto emissions would be cleaned up by 1975. These factors have been recognized by the U.S. Environmental Protection Agency, if not by the State defendants in their environmental reporting, to the extent that E.P.A. in July 1976 asked the State of New York fully to revise its old implementation plan (SIP), especially as it relates to oxidant controls.

In conclusion, with regard to the inadequacy of the State defendants' reporting with reference to the impact of the project on air quality, the Statement presents a number of specific projections concerning the reduction of automotive emissions, as hereinabove noted, along the study corridor. A close reading of the Statement would suggest that even the authors of the report believe that these figures are speculative at best. It is

Air Quality, cont.

affiant's opinion, based on his review of the designated documents and reports and his knowledge of more recent official materials and studies in the field, that these predictions are overly optimistic given that they do not reflect worst-case reporting and as required by Supplement No. 5; and, further, for the other reasons adverted to in terms of delay in implementation and substantive program failure of once anticipated reduction in air pollution as related to auto emission standards for new cars.

In short, for the foregoing reasons, it is considered that the project has failed to comply, in terms of its report of air quality impact thereof, with the reporting requirements of the National Environmental Policy Act and as related to the Clean Air Act. To comply, the air quality assessment required under Federal law must be carried out on a current basis, in accordance with the requirements of Supplement No. 5 or the most recent U.S. E.P.A. guidelines and to report on worst-case conditions in the corridor, to include collection of new data and its appropriate worst-case assessment in areas of predicted high traffic concentration.

Noise

Again, with respect to report of noise impact, Appendix No. 2 to the Comprehensive Statement was not available for review, apparently not having been included in the moving papers. However, a review of available information suggests that the Statement, again, understates the problem, even though admitting to violation of existing noise standards. The Statement appears to con-

Noise, cont.

centrate its attention to the project's noise impact on urbanized areas and to minimize or downgrade the problem in rural or farm areas. Both areas require full attention and consideration of the noise impact of the project. This is particularly true for an Interstate truckway which will produce disturbing noise levels virtually around the clock. This problem is further accentuated and exacerbated by the recommendation currently before U.S. Secretary of Transportation Coleman to increase Interstate truck weight limits from the current 80,000 pounds (40 tons) to 120,000 pounds, or sixty (60) tons. Such vehicles will produce significantly greater noise levels on the nation's Interstate Highways, including projects such as I-88; and constitute a modal analogue, in terms of their noise and environmental impact, comparable to the new levels of sound and vibration that the SST is proposed to bring to some of our airports. Even current truck noise will in fact be audible for considerable distances from the project itself, as the only significant noise source in many parts of the corridor, and on information and belief, will pose a more significant disturbance to more residents of the corridor than is in fact reported in the Statement.

For the foregoing reasons, on information and belief, it is considered that the project has failed to comply, in terms of its report with regard to its impact in terms of noise, with the reporting requirements of the National Environmental Policy Act aforesaid.

Alternatives to the Proposed Action

Likewise on information and belief, it is considered that the project has failed to comply, in terms of its report with regard to alternatives to the proposed action, with the reporting requirements of the National Environmental Policy Act and with other applicable Federal statutes and regulations with regard to the required consideration of alternatives to the proposed action and, in particular, in terms of the impact thereof upon the Capital District and rail and public transit alternatives; and, further, in respect to corridor alternatives, taken in conjunction with transportation opportunities that will more effectively accommodate the urban and rural communities embraced within the corridor to a future in which energy, and particularly dwindling petroleum resources, are probable to become more scarce and higher in price, if not exhausted, necessitating fundamental changes in the nation's transportation and land use. To the extent that planning for this highway, initiated in or before 1968 and not reexamined in terms of scope and function since that time relates to a project proposed to be constructed to meet projected rather than existing automotive and truck needs in the corridor over the next decades, the failure of the State planners adequately to have considered alternatives to the proposed action is a major defect in planning and reporting under Federal law, which will be taken up hereinafter more fully in detail.

In particular, on information and belief, there has been a failure to comply, in the planning of alternatives to

Alternatives to the Proposed Action, cont.

the proposed highway as it would impact upon the Capital District, with the requirements of Federal law as applicable to the Capital District Regional Planning Commission. Supported by State and Federal funds, the aforesaid Commission, under Federal regulations, formally reviews, as the designated metropolitan clearinghouse and regional planning agency, projects involving the use of Federal funds, particularly under Section 204 of the Demonstration Cities and Metropolitan Act of 1966 and the Federal-Aid Highway Act of 1962, as amended. Applications for Federal loans or grants to assist in carrying out open space land projects and for the planning and construction of hospitals, airports, libraries, water supply and distribution facilities, sewage facilities and waste treatment works, highways, mass transportation facilities, and water development and land conservation projects are reviewed to assure that they are consistent with the overall comprehensive plan for the region. In the case of highways, under Section 9 of the Federal-Aid Highway Act of 1962, Pub.L. 87-866, 23 U.S.C., Sec. 134, this is mandated in terms of development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of defined urban areas; with the further specific prohibition of approval of such projects unless there is a finding that such projects are based on a continuing comprehensive transportation planning process carried on in conformance with the statutorily stated objectives.

The requirements of Title IV of the Intergovernmental Cooperation Act of 1968, 32 Stat. 1103, and of Section 204

Alternatives to the Proposed Action, cont.

of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (80 Stat. 1263, 82 Stat. 208), set forth in part in the Affidavit of Dorothy L. Rosenthal, dated June 13, 1976, are incorporated herein by reference.

In conformance with the foregoing, and as applicable to the Commission aforesaid, the Director of the Office of Management and Budget promulgated regulations on July 24, 1969, in the form of Circular A-95, in partial implementation of the Intergovernmental Cooperation Act of 1968. A major revision was issued on February 9, 1971, and certain other substantive amendments were promulgated as a separate issuance on March 8, 1972. The current regulations, dated November 13, 1973 (Rev. Circular No. A-95), were promulgated by the Director of the Office of Management and Budget under Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968, aforesaid, and under Section 102(2)(C) of the National Environmental Policy Act of 1969.

On information and belief, the project sponsor has failed to carry out the requisite requirements with regard to the project under the aforesaid statutory authority and regulations issued thereunder; and continues and fails to do so in the performance of its responsibilities under law, including the proposed project itself.

Likewise to be considered, in conjunction with the foregoing failure of compliance with Federal law is the failure to have complied, in the implementation of the subject project, with the

Alternatives to the Proposed Action, cont.

requirements, as related to urban transportation planning as required in 23 CFR, Part 450, 49 CFR, Part 613, Fed. Reg., Sept. 17, 1975, p. 12976, et seq.

These requirements of Federal law, not incorporated in State planning process as related to the instant project, are indeed consistent with the State's own Environmental Action Plan, prepared by the New York State Department of Transportation in accordance with the Federal Highway Administration PPM 90-4. Insofar as herein applicable, the Action Plan provides in part as follows: (page S.1, et seq.)

"New York State's Environmental Action Plan describes the process to be used by the Department of Transportation in developing federally aided transportation plans and projects to assure full consideration of socioeconomic and environmental factors in making transportation decisions and to ensure that such decisions are made in the best overall public interest. Its objectives * * * are * * * :

* * *

"to give appropriate consideration to reasonable alternatives including alternative modes and the alternative of not building the project.

* * *

(page S.4)

"The Department will initiate the following actions for federally-aided projects for which it has total or partial implementation responsibility:

* * *

Alternatives to the Proposed Action, cont.

(page S.5)

"Implement the process as described in this Action Plan to:

"encourage parallel evaluation of all reasonable modal alternatives (transportation)."

* * *

With reference to funding, obviously a consideration in the State's planning, the provisions of Public Law 94-280, the Federal-Aid Highway Act of 1976, eff. May 5, 1976, are of pertinence. In particular, by Section 110 thereof, 23 U.S.C., Sec. 103(e)(4) is amended to read as follows:

"(4) Upon the joint request of a State Governor and the local governments concerned, the Secretary may withdraw his approval of any route or portion thereof on the Interstate System which is within an urbanized area or which passes through and connects urbanized areas within a State and which was selected and approved in accordance with this title, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by the route or a portion thereof. When the Secretary withdraws his approval under this paragraph, a sum equal equal to the Federal share of the cost to complete the withdrawn route or portion thereof, as that cost is included in the latest Interstate System cost estimate approved by Congress, subject to increase or decrease, as determined by the Secretary based on changes in construction costs of the withdrawn route or portion thereof as of the date of enactment of the Federal-Aid Highway Act of 1976 or the date of approval of each substitute project under this paragraph, whichever is later, and in accordance with the design of the route or portion thereof that is the basis of the latest cost estimate, shall be available to the Secretary to incur obligations for the Federal share of either public mass transit projects involving the construction of fixed rail facilities or the purchase of passenger equipment including rolling stock, for any mode of mass transit, or both, or projects authorized under any highway assistance program under section 103 of this title; or both, which will serve the urbanized area and the connecting non-urbanized area corridor from which the Interstate route or portion thereof was withdrawn, which are selected by the responsible local officials of the urbanized area or area to be served, and which are submitted by the Governor of the

Alternatives to the Proposed Action, cont.

State in which the withdrawn route was located. Approval by the Secretary of the plans, specifications, and estimates for a substitute project shall be deemed to be a contractual obligation of the Federal Government. The Federal share of the substitute projects shall be determined in accordance with the provisions of section 120 of this title applicable to the highway program of which the substitute project is a part, except that in the case of mass transit projects, the Federal share shall be that specified in section 4 of the Urban Mass Transportation Act of 1964, as amended. The sums available for obligation shall remain available until obligated. The sums available for obligation shall remain available until obligated. The sums obligated for mass transit projects shall become part of, and be administered through, the Urban Mass Transportation Fund. There are authorized to be appropriated for liquidation of the obligations incurred under this paragraph such sums as may be necessary out of the general fund of the Treasury. Unobligated apportionments for the Interstate System in any State where a withdrawal is approved under this paragraph shall, on the date of such approval, be reduced in the proportion that the Federal share of the cost of the withdrawn route or portion thereof bears to the Federal share of the total cost of all Interstate routes in that State as reflected in the latest cost estimate approved by the Congress. In any State where the withdrawal of an Interstate route or portion thereof has been approved under section 103(e)(4) of this title prior to the date of enactment of the Federal-Aid Highway Act of 1976, the unobligated apportionments for the Interstate System in that State on the date of enactment of the Federal-Aid Highway Act of 1976 shall be reduced in the proportion that the Federal share of the cost to complete such route or portion thereof, as shown on the latest cost estimate approved by Congress prior to such approval of withdrawal, bears to the Federal share of the cost of all Interstate routes in that State, as shown on such cost estimate, except that the amount of such proportional reduction shall be credited with the amount of any reduction in such State's Interstate apportionment which was attributable to the Federal share of any substitute project approved under this paragraph prior to enactment of such Federal-Aid Highway Act. Funds available for expenditure to carry out the purposes of this paragraph shall be supplementary to and not in substitution for funds authorized and available for obligation pursuant to the Urban Mass Transportation Act of 1964, as amended. The provisions of this paragraph as amended by the Federal-Aid Highway Act of 1976, shall be effective as of August 13, 1973."

By subdivision "(b)" of Section 110 aforesaid, 23 U.S.C., Sec.

103(e)(4) is further amended by adding the following section at the end thereof:

"In the event a withdrawal of approval is accepted pursuant to this section, the State shall not be required to refund to the Highway Trust Fund any sums previously paid to the

Alternatives to the Proposed Action, cont.

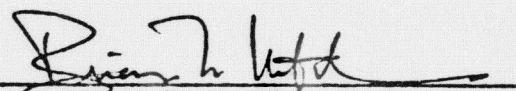
State for the withdrawn route or portion of the Interstate System as long as said sums were applied to a transportation project permissible under this title."

Without, at this time, taking a definitive position except as hereinabove noted with regard to the positive duty and responsibility of the project sponsor within the framework of Federal law and regulation to plan for and report upon alternatives to the proposed action, it is sufficient to note at this point that none of its efforts, to date, have complied with the requirements aforesaid with regard to such planning and report in the degree required, or with regard to modal alternatives or combinations thereof; or with the reporting requirements with respect thereto of the National Environmental Policy Act itself.

Energy

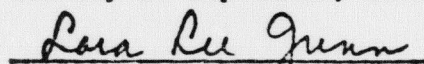
No report.

Materials with reference to public recognition of the growing energy crisis, appropriate to be considered in connection with alternatives to the proposed action, are appended as Exhibits hereto.


Brian T. Ketcham, P.E.

Sworn to before me this

9th day of September, 1976.


Notary Public

LORA LEE GUNN
Notary Public, State of New York
No. 31-1601925
Qualified in New York County
Commission Expires March 30, 1987

August, 1976

BRIAN T. KETCHAM, P.E.
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(212) 625-0033

Brian T. Ketcham received his B. S. in Mechanical Engineering from the Case Institute of Technology in 1962 and has completed three years of graduate study in Mechanical Engineering and Urban and Transportation Planning at the Massachusetts Institute of Technology. He is a Professional Engineer licensed in the State of New York. He has had fourteen years of diversified professional experience, the last eight of which have been concentrated in the area of air pollution control and analysis, transportation and traffic management, and pollution control strategy impact assessment. Mr. Ketcham is also an expert in the area of automotive emissions control.

Since April 1974, Mr. Ketcham has served as Staff Engineer of Citizens for Clean Air, Inc., providing the environmental and public interest community with technical expertise and generally acting as a technical resource for both regional groups (New York Clean Air Campaign, Scientists' Committee for Public Information, and the Institute for Public Transportation, among others) and for a number of national groups (Natural Resources Defense Council, Friends of the Earth, Sierra Club and Ralph Nader's Public Interest Research Group, etc.).

Mr. Ketcham formerly served as the Director of the Office of Planning and Implementation, New York City Department of Air Resources, where he supervised a staff of eight planners and analysts. He directed the preparation of the New York City Metropolitan Area Air Quality Implementation Plan: Transportation Controls, with the New York State Department of Environmental Conservation, and is considered the chief architect of that Plan. This Plan was hailed by the U.S. EPA as a model to be used by cities throughout the nation in their development of programs to abate mobile source pollution problems.

Concurrent with this work, Mr. Ketcham conceived, established, and managed the Bureau of Motor Vehicle Pollution Control of the New York City Department of Air Resources. He designed and outfitted a major motor vehicle emissions test facility for that activity and secured over a million dollars in U.S. EPA funds for this project. In addition, he obtained several research and development grants from the U.S. EPA for the Bureau, for the Taxi and Limousine Commission, and for the New York City Transportation Administration. He introduced the first fleet tests of catalytic-type emissions control systems on passenger vehicles. He also introduced the first test program for sub-compact passenger vehicles as an energy and cost savings measure for the City of New York.

On July 20, 1973, Mr. Ketcham received the 1973 New York City Merit Award for his major role in the City's program for abating vehicular-related air pollution. In December 1974, Mr. Ketcham was appointed to Governor Hugh Carey's Environmental Task Force, an honorary group of distinguished environmentalists formed to develop and recommend new State environmental programs. On April 25, 1975 the U.S. Environmental Protection Agency awarded Mr. Ketcham their Certificate of Appreciation for his efforts to improve the environment

BRIAN T. KETCHAM, P.E.

August, 1976

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and insure the active participation of the public in this process. In November, 1975 EPA again awarded Mr. Ketcham their Special Award of Merit for his "significant work in environmental education and planning."

Mr. Ketcham has likewise been active in investigating the socioeconomic and environmental costs of the automobile, authoring a number of papers on this issue and organizing an all-day panel discussion for the January, 1973 Annual Meeting of the Society of Automotive Engineers in Detroit, Michigan. He was also the only environmentalist to have been invited to participate in the 1973 International Conference on Transportation Research (June 1973, Bruges, Belgium), where he was a member on a panel concerned with "The Future of the Automobile Within the City".

Mr. Ketcham currently serves as a consultant to the Office of Technology Assessment of the Congress of the United States and has worked on such projects as the "Technology Assessment of Changes in the Use and Characteristics of Automobiles" and "Review of EPA's Five Year Research Plan." In addition, under contract to the Regional Office of the Environmental Protection Agency, he continues to provide technical assistance concerning the Tri-State urban transportation planning process.

Since late 1973 Mr. Ketcham has served as a consultant to the Natural Resources Defense Council, Inc. on numerous litigations involving the Clean Air Act and requirements for implementing transportation control measures. Mr. Ketcham continues to serve as a consultant to community and regional organizations that are plaintiffs in the federal suit against the West Side Highway Project. As such he has advised Counsel to Plaintiffs with regard to air quality and transportation aspects of the litigation and has testified as an expert witness in the trial with regard to air quality issues in the District Court.

Mr. Ketcham's early professional experience was in the area of automotive engineering. He assisted in the design, development and testing of Wankel engines for the Curtiss-Wright Corporation, of gas turbine aircraft engines for the General Electric Company, and was responsible, as an independent consultant, for the design and development of high performance engines for other companies. More recently, and in cooperation with Dr. William Balgord, Mr. Ketcham has independently equipped a number of American-made automobiles with dual-catalyst emissions control systems. These passenger cars were the first independently to demonstrate federally-mandated statutory 1978 automotive emissions standards while at the same time improving fuel economy and driveability.

Mr. Ketcham is a Fellow of the Scientists Institute for Public Information, a Director of the Institute for Public Transportation, a Director of Transportation Alternatives, and a member of the Society of Automotive Engineers. He is a member of the Committee on Transportation and Land Development and a Task Force Member of the Committee on Citizen Participation in Transportation Planning, both of the Transportation Research Board, National Academy of Sciences. In addition he serves on the Advisory Council to the Commissioner of the New York State Department of Transportation. He has lectured and published extensively in the area of automotive emission control, and in environmental planning and implementation.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

CITATION

In recognition of the recipient's environmental achievements to date, the Region II Office of the U.S. Environmental Protection Agency is pleased to present its Certificate of Appreciation to Brian Ketcham, Vice President, Citizens for Clean Air.

Mr. Ketcham was chief architect in 1973 of the Transportation Control Plan for New York City while he served as Director of the Office of Planning and Implementation, New York City Department of Air Resources. As staff engineer of Citizens for Clean Air, he has provided technical support in detailed critiques of proposed revisions to the plan for more responsible enforcement by EPA of the transportation control strategies.

Mr. Ketcham has also done considerable engineering work in the design, development and testing of Wankel and gas turbine engines, as well as dual catalyst emission control systems. The latter systems first publicly demonstrated federally mandated vehicle emission standards while improving fuel economy and durability.

He is also a member of Governor Carey's Environmental Task Force for the State of New York.

A handwritten signature in cursive script, reading "Gerry Hansler".

Gerald M. Hansler, P.E.
Regional Administrator

May 7, 1975

Brian T. Ketcham, P.E.

Work Experience

Design Engineer, General Electric Company, Small Aircraft Engine Department, Lynn, Massachusetts (6/62 to 9/63): Responsible for the design and development of gas turbine aircraft engines.

Chief Engineer, Car Shop Incorporated, New Orleans, Louisiana (9/66 to 2/68): Responsible for the design and development of high performance engines; competition automobiles.

Senior Design Engineer, Curtiss-Wright Corporation, Woodridge, New Jersey (3/68 to 6/69): Assisted in the design, development and testing of Wankel-type internal combustion engines.

Director, Bureau of Motor Vehicle Pollution Control, New York City Department of Air Resources (7/69 to 12/71): Responsible for the implementation of all City activities regarding mobile source pollution control. Acted as consultant to the State Department of Environmental Conservation and to the United States Environmental Protection Agency on issues related to vehicle emission control.

Director, Office of Planning and Implementation, New York City Department of Air Resources (1/72 to 11/73): Responsible for all long-range planning for the Department; chief architect of the New York City Metropolitan Area Air Quality Implementation Plan: Transportation Controls.

Staff Engineer, Citizens for Clean Air, Inc. New York, New York (4/74 to Present): Only licensed Professional Engineer working full time in the New York metropolitan area in the public interest; principle technical expert in West Side Highway and Transportation Control Plan litigations.

Selected Publications of Brian T. Ketcham, P.E.

- o With New York City EPA Staff, "The Car is Anti-City," Environmental Protection Administration, City of New York, April 1971.
- o With Jack C. Fensterstock, "The Restructuring of Cities Through Transportation Planning," presented at the Urban Technology Conference, AIAA Paper No. 71-517, May 1971.
- o With Michael P. Walsh and Staff, "New York City's Implementation Plan for Automotive Related Air Pollutants," New York City Environmental Protection Administration, January 1972.
- o "A Sensible Mass Transportation Program - Will It Work?" presented at the Sixth Annual New York Consumer Assembly, March 4, 1972.
- o "Environmental Aspects of Transportation," presented at the American Association for Public Administration, March 22, 1972.
- o "Urban Goods Movement and Environmental Quality," Proceedings of the Metropolitan Goods Movement Symposium, United Engineering Center, New York City, March 27, 1972.
- o With Jack C. Fensterstock and Michael P. Walsh, "Problems Associated with Air Quality Control Region Implementation Plan," Conference Proceedings on "The Relationship of Land Use and Transportation Planning to Air Quality Management," Center for Urban Policy Research and Conferences Department, Rutgers University, May, 1972.
- o With Peter Kahn, "The Automobile and the Environment," Citizens for Clean Air, Inc., New York City, copyright 1971, published June 1972.
- o With James P. Romualdi, Robert C. Stark and William Spreitzer, "Urban Transportation," Public Affairs Report Number 2, Society of Automotive Engineers, Inc., New York City, January 1973.
- o "Automotive Pollution Control: An Alternative Approach," presented at the International Conference on Transportation Research, Bruges, Belgium, June 18, 1973.
- o "The Implications of Present Trends for Air Quality," Proceedings of the International Conference on Transportation Research, Bruges, Belgium, June, 1973.
- o With DAR and DEC Staff, "New York City Metropolitan Area Air Quality Implementation Plan: Transportation Controls," New York State Department of Environmental Conservation, February 1973. Revised April 1973. Approved by Federal EPA June 15, 1973.

Selected Publications of Brian T. Ketcham, P.E. (cont'd)

- o "New York's Implementation Plan for Transportation Controls: What It Is; Why We Need It; What It Will Do For Us," presented to the International Motor Press Association, August 23, 1973.
- o With Mike Arrow and Jim Coyle, "Environmental Impact of Goods Movement Activity in New York City," Transportation Research Record No. 496, Urban Goods Movement, Transportation Research Board, National Research Council, 1974.
- o "A Preliminary Analysis of the City/State July 26, 1974 Proposed Draft Amendment to the New York City Metropolitan Area Air Quality Implementation Plan: Transportation Controls (April 1973)," prepared for Citizens for Clean Air, Inc. August 6, 1974.
- o With Dr. William Balgord and Paul Stimson, "A Dual-Catalyst Emission Control System to Meet Clean Air Act Standards and Improve Fuel Economy," prepared for Citizens for Clean Air, Inc., September 3, 1974.
- o With the Scientists' Committee for Public Information, "A Brief Look at Clean Air Alternatives for New York City," prepared for the U.S. Environmental Protection Agency, October 7, 1974.
- o "A Critique of the Energy Conservation Act of 1974," statement before the Senate Commerce Committee, November 26, 1974.
- o "Report to the Environmental Protection Agency Concerning the Auto Industry Request for an Extension in Vehicle Emission Standards," prepared for Citizens for Clean Air, Inc., February 4, 1975.
- o With the Scientists' Committee for Public Information, Inc., "A Program to Market the New York City Metropolitan Area Air Quality Implementation Plan: Transportation Controls," for the U.S. Environmental Protection Agency (EPA Contract No. 68-01-2802), August, 1975.
- o "Financing Transportation in the New York Metropolitan Area: The Impact of a Transit Fare Hike," statement before the New York State Senate Committee on Transportation, September 10, 1975.
- o "A Dual-Catalyst Emission Control System to Meet Clean Air Act Statutory Standards and Improve Fuel Economy," prepared for Citizens for Clean Air, Inc., October 8, 1975.

Selected Publications of Brian T. Ketcham, P.E. (cont'd)

- o With Jeffrey Cohen, Esq., "Reducing Energy Consumption in Existing Multi-Family Housing," prepared for the New York Community Trust, October 31, 1975.
- o "A Critique of the National Science Foundation's Science for Citizens Program," statement before the National Science Foundation, Washington, D.C., December 15, 1975.
- o "Tolling the East and Harlem River Bridges: The Equity Issue," presented to the Institute of Traffic Engineers, New York, January 28, 1976.
- o "A Critique of the Tri-State Regional Planning Process," statement at the Informal Meeting on Issues in the Tri-State Region held by the New York Department of City Planning and the Tri-State Regional Planning Commission, New York, February 3, 1976.

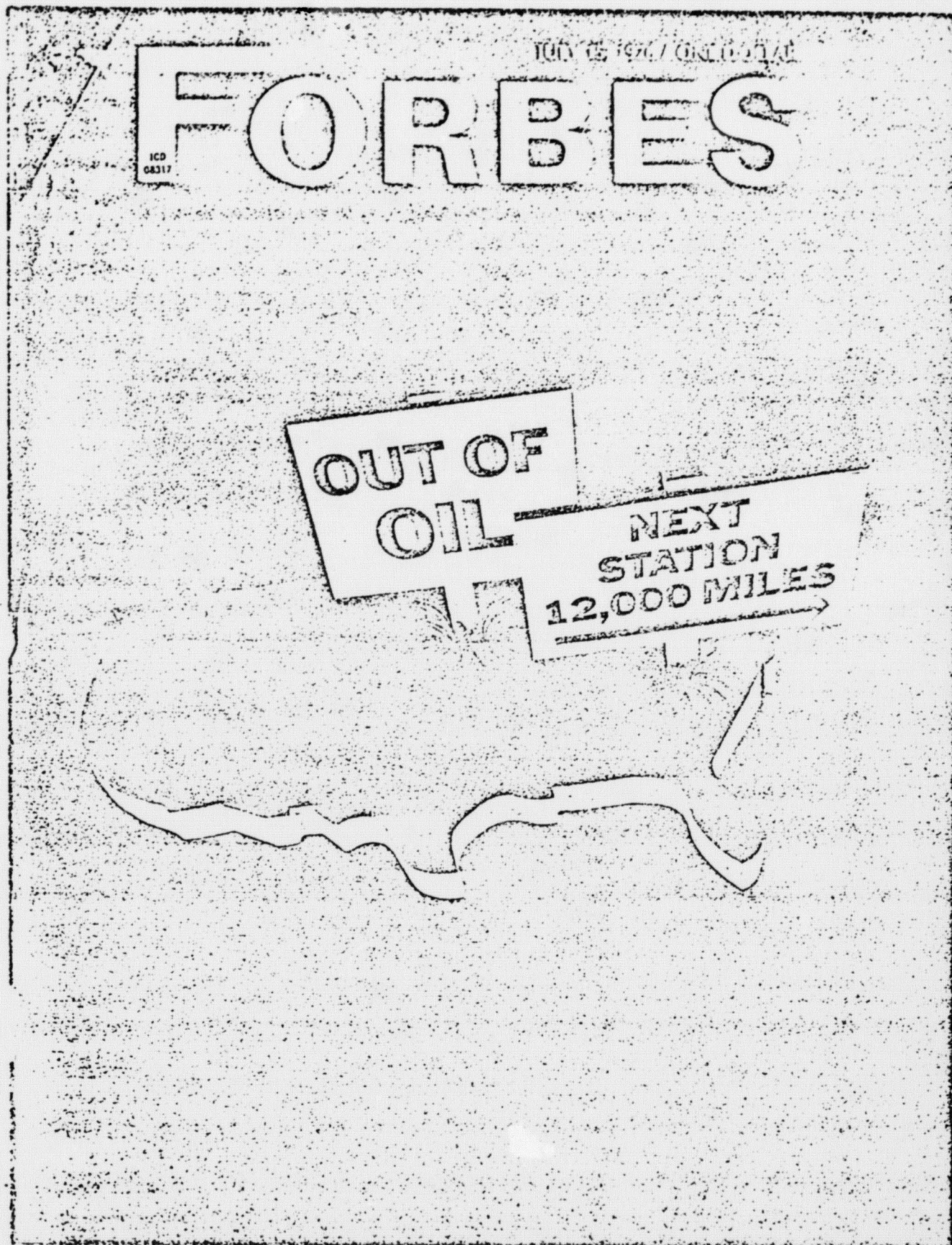


Exhibit "A" -

Cook, James, The Invisible Crisis,
Forbes, July 15, 1976, pp. 26-29.

The Invisible Crisis

That's what they are calling the energy situation, but the fact is that the crisis is visible enough for those who care to face the facts.

By JAMES COOK

IF YOU THINK the energy crisis is past, consider this: In 1976 the U.S. may spend as much as \$35 billion on imported oil; by 1980, even if oil prices do not go up, we will probably be spending \$45 billion. If oil sells for, say, \$15 a barrel in 1980, the import figure will be closer to \$60 billion.

As recently as 1971, the U.S. spent only \$3.7 billion on foreign oil.

Let's put these figures in perspective: Our total imports this year will be about \$112 billion, our total exports \$110 billion.

Thanks largely to the boom in agricultural exports, the U.S. has gotten through so far in remarkably good shape. But can we continue to count on food exports to keep us from running a deep balance-of-payments deficit? Most of the experts think not.

And that's just our financial vulnerability to the energy situation. Consider the political vulnerability. When our oil imports were under \$4 billion, most of the oil came from Canada, Venezuela and other nearby, generally friendly countries. But Canada will soon cease exporting oil, and Venezuela has cut back. By the end of this decade—only 3½ years from now—the U.S. will be buying 25% of all its oil, well over 10% of all its energy, from Arab countries.

What would happen if we could not get this Arab oil in the quantities we need and at a price we can afford? Listen to John H. Lichtblau, head of New York's Petroleum Industry Research Foundation: "You could cut 2.5 million barrels a day from the 7 million barrels a day of gasoline demand by eliminating nonessential driving. You could cut 10% to 15% from our heating oil consumption, another 15% from electric utilities. You could curtail airplane travel. But you'd have massive unemployment, gasoline stations shutting down by the thousands, motels and resorts and everything that goes with it—a recession in the auto and tire industries. You can do these things during a war because there's so much use for labor in the military industries, but you do it in peacetime, and you have nothing to make up for it. You create a disastrous recession."

The 1973-74 embargo, according

to Federal Energy Administration estimates, cost the U.S. \$10 billion to \$20 billion in gross national product and perhaps 500,000 jobs. If a six-month embargo were imposed next year, according to the Congressional Research Service's energy expert, Herman T. Franssen, it could cost the U.S. as much as \$56 billion in gross



Realist? "We've had three embargo situations in the last 15 or 20 years," says FEA Administrator Frank Zarb, "and there's not much to suggest that there won't be another."

national product and 1.5 million jobs.

The one certainty is that the U.S.' vulnerability to supply interruptions will get worse, not better, for some years to come, and there's not much anybody can do about it: We are paying now for past neglect. U.S. oil and gas reserves are running out, and in the short run there is nothing to replace them but imported oil. U.S. oil production has already declined more than 13% from its 1970 peak and will probably go on dropping until Alaskan production temporarily interrupts the decline. U.S. natural gas production is declining even more rapidly—off 11% since production peaked out two years ago and likely to go on declining for the foreseeable future. With Canada and Venezuela running out of oil themselves, there are only the Eastern Hemisphere producers

and the Arabs to fill the gap. "For the next year or two," says Lichtblau, "our vulnerability to an embargo increases every day."

"It's very easy to figure out where you're going over the next five years," says Eric Zausner, the Merlin of FEA's computer forecasting program, "because there's not too much that can happen that isn't already going on. The next two or three years are easy." Easy, meaning bad.

In looking for additional oil supplies, the U.S. doesn't have much to choose from. Of the 10 million barrels a day of unused production capacity around the world, more than 70% is concentrated in Arab countries. 46% in Kuwait and Saudi Arabia alone. And it's not simply a question of existing capacity. The Arabian peninsula offers the principal source of future capacity as well. Though it accounts for less than a fourth of the world's production, the Arabian peninsula possesses more than a third of the world's petroleum reserves. As one Exxon economist says: "Not many OPEC nations outside the Persian Gulf have much expansion capability. We see the Arabian peninsula as the big flywheel for future demand."

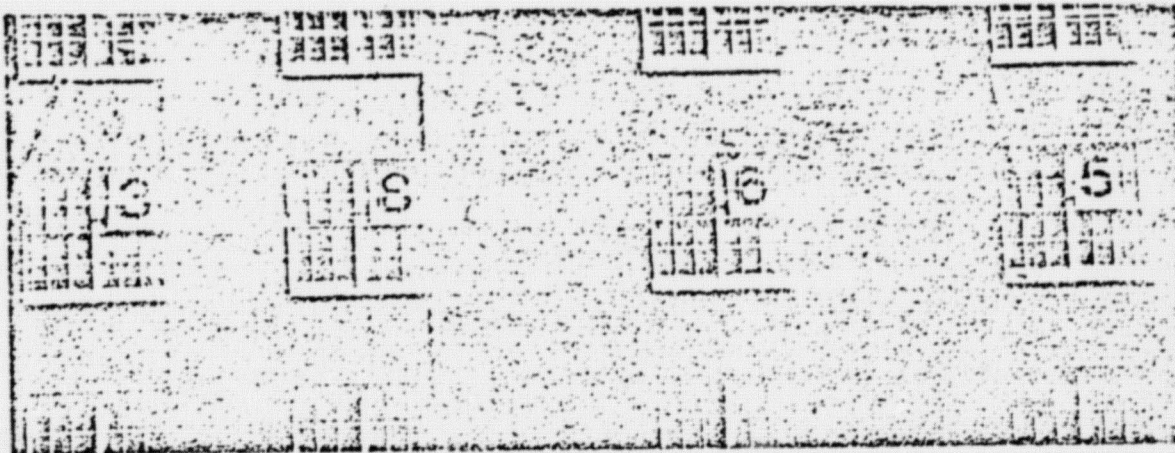
To a large extent, the degree of the U.S.' import dependency is contingent on whether the growth in U.S. energy demand settles back—as most experts expect it to—to under 3% annually, as against the pre-embargo level of roughly 4%. If energy demand grows less than that, the problem recedes; but nobody thinks that likely. And if it grows more rapidly, the problem increases. At the height of the oil embargo, bureaucrats, politicians and citizens alike talked about the need for small cars, for holding highway speeds to 55 miles an hour, for turning thermostats down to 68°, and though the emergency faded, energy consumption declined two years in a row, the first such decline since the end of World War II.

Some of the drop in demand was due to a fluke: Five straight years of unexpectedly warm winters averted predicted shortages of natural gas and heating oil. But many energy experts nonetheless began to suggest conservation could go a long way toward keeping the growth in de-

Exhibit "A" -

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mand under control. Industry made impressive savings—one former FEA official predicts it could cut its energy costs another 15% to 25% without any further investment, and Congress gave private conservation a significant long-term boost by decreeing that new cars must average 20 miles to the gallon by 1980, 27.5 mpg by 1985, vs. 17.6 mpg today.

As the U.S. comes out of the recession, however, oil demand is in fact up something like 4.2%—about in line with the 4% most were expecting. What worries a lot of observers is that gasoline demand—which amounts to about 45% of total petroleum demand—has been rising alarmingly. After having lagged for two years, it's gaining by 6%, 7% and even 8%. That's substantially more than anyone had foreseen, and suggests that the American people have returned to their wasteful ways. "The increase in gasoline demand is not related to the economic recovery," observes Clement Malin, assistant administrator for International Energy Affairs at FEA. "So that seems to put us back on the track we were on before 1973." The difference is far from inconsequential. Over a five-year period, a percentage point difference in the rate of growth comes to 1 million barrels a day.

The Wrong Way

How, in a democracy, do you get people to use less oil? The best way, the time-tested way, is the way of the marketplace. You simply let prices rise—or push them up through higher taxes. But the U.S. is not doing this. Instead, it forces its oil producers to sell their domestic oil for much less than the world price. "Old" oil—that is, oil that was brought into production before price controls went into effect in 1973—is price-controlled at \$5.20 a barrel; "new" oil at \$11.63. This compares with a delivered price for imported oil of \$13.27 a barrel.

Since 59% of the U.S.' oil needs still

Doomsday. This sign in FEA's Washington office signals the number of days' supply of oil the U.S. has left to it—3,865 when this picture was taken, and that's just over ten years' supply.

come from domestic wells, this gives U.S. consumers and U.S. industry a short-lived and illusory advantage in the form of cheaper energy. The advantage is *short-lived* because it will diminish as the proportion of imported oil goes up. It is *illusory* because it encourages Americans to continue to use more oil than they should.

The situation is even worse in natural gas, which provides 28% of the U.S.' energy needs (oil provides 46%, coal 19%, nuclear 2%). Regulated gas sold in the interstate market—and that's 60% of U.S. consumption—goes for a maximum of 52 cents per thousand cubic feet, and an average of 30 cents, less than a sixth the price of equivalent oil. Why? Because that's the federal law.

Unavailable Alternatives

In theory, the U.S. could still put itself in a position to meet most of its energy needs from its own resources. For this it would not have to depend on new energy sources like oil shale or tar sands, or even from technological advances like synthetic oil and gas; all of these may be too high-cost ever to be economic. The U.S. could be self-sufficient on its recoverable coal reserves—284 billion tons, enough to last 450 years at current rates of consumption. On top of this, the U.S. has a large uranium reserve for nuclear power production.

So far, however, the U.S. has been unable to channel these coal and uranium resources into reducing its dependence on imported oil. Other energy-related concerns have continued to seem more important—the health and safety of mine workers and citizens, the integrity of the earth, air and water. As a result, it has been impossible for the U.S. to make any

appreciable increase in its coal production. Mining coal poses such a threat to our earth and water resources that the Department of the Interior has temporarily banned the leasing of federal coal lands, and burning it threatens to poison the very air we breathe. All these hazards may be considerably exaggerated, but they help explain why, between 1970 and 1975, coal production rose only 5.5%, to 646 million tons.

In the end, the environmental and safety objections can be met—at a price—but as things now stand, coal labors at a further disadvantage: It cannot compete easily with *underpriced*—by law—fuels like domestic oil and gas. In the first four months of this year, when oil demand was up 3.6%, coal production was up only 2%. At least one coal producer complains that his production has been squeezed out of the utility market by dump sales of natural gas. The FEA hopes coal production will increase to over 1 billion tons by 1985, but the prospects are dim. "We will be lucky," says Ford, Bacon & Davis' energy expert, Gerard C. Cambs, "to be producing 800 million tons by 1985." Every 100-million-ton shortfall means 1 million barrels a day of additional imported oil.

The U.S.' nuclear future seems a bit brighter now that California voters have defeated the dishonest and well-financed effort by the so-called antinukes to put nuclear energy out of business in their state. But horrendous hurdles still exist. Environmentalists have succeeded in delaying construction of nuclear plants that they now can take as much as twice as long to build in the U.S. as anywhere else in the world. More seriously, uncertainties about the pattern of future demand and the availability of capital to finance new construction have caused the utilities to cancel 70% of the plant capacity originally scheduled for operation in 1985. Even so, if the 175 plants licensed or under

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construction are built on schedule, the U.S. should be getting 10% of its energy from nuclear power by 1985, vs. 2.5% today, an increase of roughly 100 million kilowatts. But for every 10 million kw of capacity that doesn't get built, the U.S. will probably import 250,000 barrels a day of oil.

Federal Energy Administrator Frank Zarb and the FEA continue to have high hopes for the future of domestic oil and gas. Under the proper circumstances, the FEA forecasts 12.9 million barrels a day of production in 1985, vs. 8.3 million today, and gas production of 22.3 trillion cubic feet, vs. 20.1 trillion today. But this projected gas production depends on the timely deregulation of the price (something Congress has refused to do for two decades), while the projected oil production hinges on the development of various new areas—the Gulf of Alaska, the outer continental shelf—and so far such development has fallen well behind schedule.

There may be as many as 127 billion barrels or as few as 50 billion on the outer continental shelf, as the U.S. Geological Survey suggests, but the range suggests the risk. Last December the Interior Department put 1.3 million acres of offshore oil leases up for auction, and found takers for only a third. Eight outer continental shelf sales are scheduled for this year, but only half are likely to take place. The risks are enormous, and with no certainty that Congress will deregulate oil when the present price-control program expires in 1979, the rewards are not all that spectacular. FEA is equally optimistic over the prospects for secondary and tertiary recovery, but with old oil held at \$5.20 a barrel, the incentive is noticeably lacking. Nothing is more illustrative of the stupidity of U.S. energy policy than its effect on secondary recovery. At \$5.20 a barrel, it rarely pays.

The only new major domestic source of oil on the horizon at the moment is the Alaskan North Slope—1.2 million barrels a day initially; 2.4 million by 1985, enough to meet a year or two of additional growth in U.S. demand. The law requires Alaskan oil be committed to the U.S. market, though just how much of Alaska's output the U.S. will be able to use itself is very much an open question. Since the pipeline got under way, demand has slackened, and Congress has decided to bring the Naval Petroleum Reserves at Elk Hills, Calif. into production. West Coast refineries do not yet have the ability to refine more than a portion of Alaska's crude production, and if they did—something an enormous cap-



In Jeopardy? Some 3,955 imperfect welds threaten to delay the opening of the Alaskan pipeline by seven to 18 months, depriving the U.S. of 1.2 million barrels of oil a day at a time when supplies are expected to begin tightening.

ital investment could cure—the West Coast market is not large enough to absorb much more than 800,000 barrels a day of its output. There are as yet no pipeline facilities for moving Alaskan oil inland to the Midwest, though there are schemes aplenty, and once the pipeline hits full production, not enough ships to move the excess to East Coast refineries.

Thus the oil companies face the prospect of having to ask the President and Congress for permission to ship at least a portion of the pipeline's output abroad—to Japan most likely. Either that or shut in part of a \$7-billion investment. Given the way oil is normally exchanged around the world, the resulting increase in U.S. imports would be balanced by a corresponding increase in U.S. exports—but politicians are obtuse in such matters. And a request to sell Alaskan oil to Japan is likely to create a political brouhaha that could make the furor over breaking up the oil companies seem like a storm in a teacup.

Contrived Complacency

So far, however, Congress has refused to take seriously our growing dependence upon imported fuel or the hazard this dependence could pose to the U.S. economy and the independence of U.S. foreign policy. "The energy crisis ended," coos Secretary of the Treasury William Simon, "and we weathered the storm." As a former head of the FEA, Simon

ought to know better. In emphasizing the possibility of energy independence, the FEA has inevitably deemphasized its improbability and encouraged Congress and many others in and out of government in their complacency.

"From our standpoint," the FEA's Zarb says, "we can't conceive the nation will allow imports to go to 12 million and 13 million barrels a day by 1985. We don't believe our policymakers will allow that to happen." But given how long things have been permitted to slide, is there anything the policymakers can do?

Zarb knows better than most that the policymakers in Washington do not even want to hear how serious the energy supply situation is, much less do anything about it. They prefer to worry about more politically sexy issues like the dismemberment of the oil companies, the removal of the depletion allowance and the imposition of price controls on new oil.

One of the few constructive moves to date is the Strategic Petroleum Reserve that Congress mandated last December. Under the legislation, the FEA is required to put a 90-day supply of oil in storage—up to a maximum of 1 billion barrels—for use in an emergency. The oil will be stored in salt domes and abandoned mines close to tanker terminals, refineries or pipelines, so that the U.S. will have time to cope with any embargo or other interruption in supply without having to resort to paratroops and without undergoing severe dislocations in the economy.

The program will be costly. A billion barrels could cost upwards of \$10 billion, depending upon what price the oil is bought at, but that's still less than the 1973-75 embargo cost the gross national product. At the moment, assuming a 6-million-barrel-a-day import level, the FEA has set 540 million barrels as its initial target. Assuming that no embargo would be more than 50% effective, as most experts think likely, that would give the U.S. six months' protection—more if the U.S. imposed conservation measures, as surely it would do. Moreover, the very existence of such a reserve should discourage the imposition of an embargo. "If they know any embargo would take over half a year to take effect," says John Lichtblau, "they will know that for the first six or eight months they would hurt only themselves."

Once the strategic reserve is in place, the U.S. and the industrial West in general will have an oil weapon of their own for the first time since the Organization of Petroleum Exporting Countries seized control of the

oil price five years ago. Just as an embargo against the U.S. forces the U.S. partners in the international energy-sharing agreement to put pressure on the U.S. to moderate the actions that provoked the embargo, so the strategic reserve could enable the U.S. to take selective action against individual producing countries.

Once the strategic reserve is in place, many of the producing countries—those with large populations, relatively little oil and high absorptive capacity—would be damaged more by the loss of six months' oil revenues than the U.S. would be by the loss of six months' supply of oil. "We could use our oil reserves," one observer comments, "literally to bring another country to its knees."

Unfortunately, such measures, defensive or offensive, are impossible until the strategic reserve is in place, and that's unlikely to happen any time soon. FEA has drawn up an initial budget (yet to be approved by Congress) of \$314 million for facilities and site acquisition and another \$550 million for the acquisition of the first 50 million barrels of oil. By 1978 the U.S. is required to have 150 million barrels in storage—seven to eight weeks' supply—but not until 1982 is the reserve required to be in place. So much for the urgency with which Congress views the problem.

"If we had a billion barrels in storage, today," Frank Zarb concedes, "it would change a lot of things, including our bargaining position in respect to the producing nations. It would shift the balance in international oil."

Nature's Dirty Trick

But even the strategic reserve would be effective only as a short-term weapon. The long-range problem is one that defies rational solution, because it is a problem posed by nature, by geology, rather than by economics or politics. The problem is that the producing countries with the largest reserves are Saudi Arabia, Iran, Kuwait, Libya and the United Arab Emirates. By a dangerous twist of nature, with the exception of Iran, these happen to be the countries with the largest populations, and, as a result, the least need for the revenues their oil production generates. Producing at little more than 65% of its present capacity, Saudi Arabia last year raked in something like \$26 billion in oil revenues. With a population of under 9 million and a society still at a relatively low level of development, the Saudis succeeded in investing less than \$6 billion in their domestic economy. That left them with the difficult task of investing the

remaining \$20 billion elsewhere in the world—often in countries where it did not always seem welcome.

Confronted with similar surpluses, Kuwait has already set a 2-million-barrel-a-day limit on its oil production (57% of capacity) and Saudi Arabia itself—in the aftermath of the 1973-74 embargo—set a 8.5-million-barrel-a-day limit on its production, vs. output of 7.1 million barrels a day last year. What this means is that, if Saudi Arabia decided to hold its production at present limits as Kuwait has already announced it will do, the world will have relatively little excess oil-producing capacity to take care of the inevitable growth in demand in the late Seventies. And why should the Saudis expand their output? Hard put to invest \$20 billion a year in excess oil revenues, it faces the prospect of having to invest \$30 billion, even \$45 billion if its production expands to its present limits.

It's no secret that a debate has been going on for some time within the Saudi Arabian royal family about the wisdom of maintaining even today's production levels. So far, the conservationists have not prevailed, but the potential remains. "We are in a position to reduce our production to 3 million, 3.5 million barrels a day," Saudi Arabia's oil minister,



Embargo isn't the only threat to the world's oil supply. All of Saudi Arabia's crude converges on Ras Tanura through 1,000 miles of pipeline, affording terrorists ample opportunity for sabotage.

Sheik Ahmed Zaki Yamani, told *Forbes* a few months ago. But he added, "This is a theoretical question. We are against doing it." Says Abdul Hadi Taher, head of Petromin, Saudi Arabia's government oil company, "We are planning on increasing capacity now, in a kind of goodwill gesture, to assure the world the oil is available when it is needed." Thus is the entire industrial world at the mercy of a mere handful of men—the few thousand descendants of the desert warrior Abdul Aziz ibn Saud—who virtually own Saudi Arabia.

"If we really want them to export that much oil," says Herman T. Franssen, "we've got to find some way for them to invest their money, some outlet to bridge the time until they can utilize that capital. They look to the U.S. for an answer, and it had better be a good one."

"The energy problem," says New York oil consultant Walter J. Levy, "is an invisible crisis. Our balance-of-payments drain is invisible. And if five or ten years from now the flow of oil declines, that again is invisible. But it is there."

"Sometimes," says Frank Zarb, "you get the feeling you're living in that society that used to behead the bearers of bad news. People don't want to hear it anymore. But that doesn't make it any less true or urgent." Zarb has kept his head longer than any of the four administrators who preceded him, but he played an equivocal role—on the one hand encouraging Congress in its delusions of independence and on the other periodically puncturing its complacency with a forthright warning of disaster. "An embargo is certainly possible," he repeats in the tone of one who has said it all too often before, "and entirely likely." But then everyone knows that.

"There has been a failure," says Interior Secretary Thomas Kleppe, "by government, by industry, by the academic community, by the press—by everyone who knows the facts—to communicate to the American people the severity of the energy crisis.... We are threatened with political and economic bondage not unlike that which touched off the American Revolution some two centuries ago."

If the next administration—Democratic or Republican—wishes to lead the American people and not simply drift with the political breezes, the energy situation is a golden opportunity for such leadership. An ordinary politician would shun the problem—too many risks. Clearly, the need is for extraordinary policies—policies aimed at the history books rather than vagaries of political poles.

22 August 80, 1976

THE NEW YORK TIMES

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Energy Conservation...

The 16 nation International Energy Agency in Paris recently reported that the member country with virtually the worst record in conserving energy was the one that conceived the I.E.A. in 1974 to reduce the vulnerability of the industrial nations to another Arab oil embargo or price increase. That country is the United States, which has substantially increased both its dependence on imported oil and the proportion coming from the Arab nations.

Economic recovery this year, unaccompanied by significant conservation measures—or by increased domestic oil production, which instead has declined—has sucked in oil imports as the only ready source of energy to meet increased demand. The dramatic two-month rise in oil imports to a staggering annual rate in July of \$18 billion, half again as much as last year's total, undoubtedly was a temporary phenomenon. But the trend that it exaggerated was already disastrous, with almost 40 percent of the country's oil imports in the first six months of this year, and with 44 percent of the imported oil coming from the Arab nations, as against 32 percent a year earlier.

Despite major increases in exports to the OPEC countries over the last two years, the American trade deficit with the oil-exporting nations ran at an annual rate of \$13 billion in the first half of this year. Only the prospect of huge surpluses in trade with West Europe and Japan could offset the depressing consequences of the overall trade deficit this year to the \$4.2 billion now projected by the Commerce Department.

Neither the Ford Administration nor the Democratic Congress has come up with an energy program capable of reversing this dangerous trend. And even the inadequate conservation programs written into the Senate version of the tax reform bill now appear to be in jeopardy.

That bill would authorize tax credits of about \$500 million as incentives for homeowners and industry to install insulation, storm windows, heat pumps and solar or geothermal equipment. But the House Commerce Committee has insisted that these provisions be transferred to a separate energy bill that the Senate Finance Committee has voted, which would call for a one-cent-per-gallon increase in the federal gasoline tax, passage this year or soon. A bill is unlikely, since the Senate this month already has voted three-to-one against an insignificant one-cent-per-gallon gasoline tax increase.

Meanwhile, the automobile industry is again emphasizing production of big, gas-guzzling cars, claiming that the consumer interest in small cars has declined. Steeply graduated taxes on large cars are needed urgently to reverse this trend.

Above all, the country must be brought to face the need for sharply increased gasoline taxes, combined with rebates to low-income groups. Priorities involved in boosting coal output and bringing in other alternative energy sources, such as synthetic oil and gas, must be overcome.

...Or 1977 Oil Crisis

A new energy crisis with an oil-supply squeeze and steep price increases appears to be shaping up for next year and gives even greater urgency to major conservation measures. A study by oil economist Walter Levy predicts that the reviving world economy will bring a surge in oil demand that could require OPEC shipments at the projected 1980 rate of 31.2 million barrels a day by mid-1977. OPEC production now is only 29.3 million barrels a day, about 3 million barrels a day below next year's needs.

By 1979-80, North Sea and Alaskan oil will be available to meet the industrial world's growing demand for a time. But during 1977, the increased demand of about 3 million barrels a day can be met only by the OPEC nations and, when political and technical obstacles are studied, above all by Saudi Arabia, without a Saudi

decision to lift its 8.5-million-barrel-a-day production ceiling to a minimum of 10 million barrels a day next year, the stage will be set for a world shortage and a steep OPEC price increase.

In the past year, Saudi Arabia has been a moderating force in OPEC and, at the Bali meeting in May, virtually imposed a price freeze for the rest of 1976. But with prospects reviving in the industrial nations and other OPEC nations pressing for price rises, there can be no certainty about next year's policy.

It is up to the United States to try to influence the Saudi decision in the right direction. That influence will be greater if the Saudi national interest in limiting production and preserving oil resources for the future is respected. A major new conservation effort in the United States would not only reduce the projected 1977 demand, but would also help to persuade Saudi Arabia to fill the remaining gap without exploiting the shortage by exacting large price increases.

Exhibit "B" -

The New York Times, Editorial
 Energy Conservation... ..Or 1977 Oil Crisis
 August 30, 1976, page 22

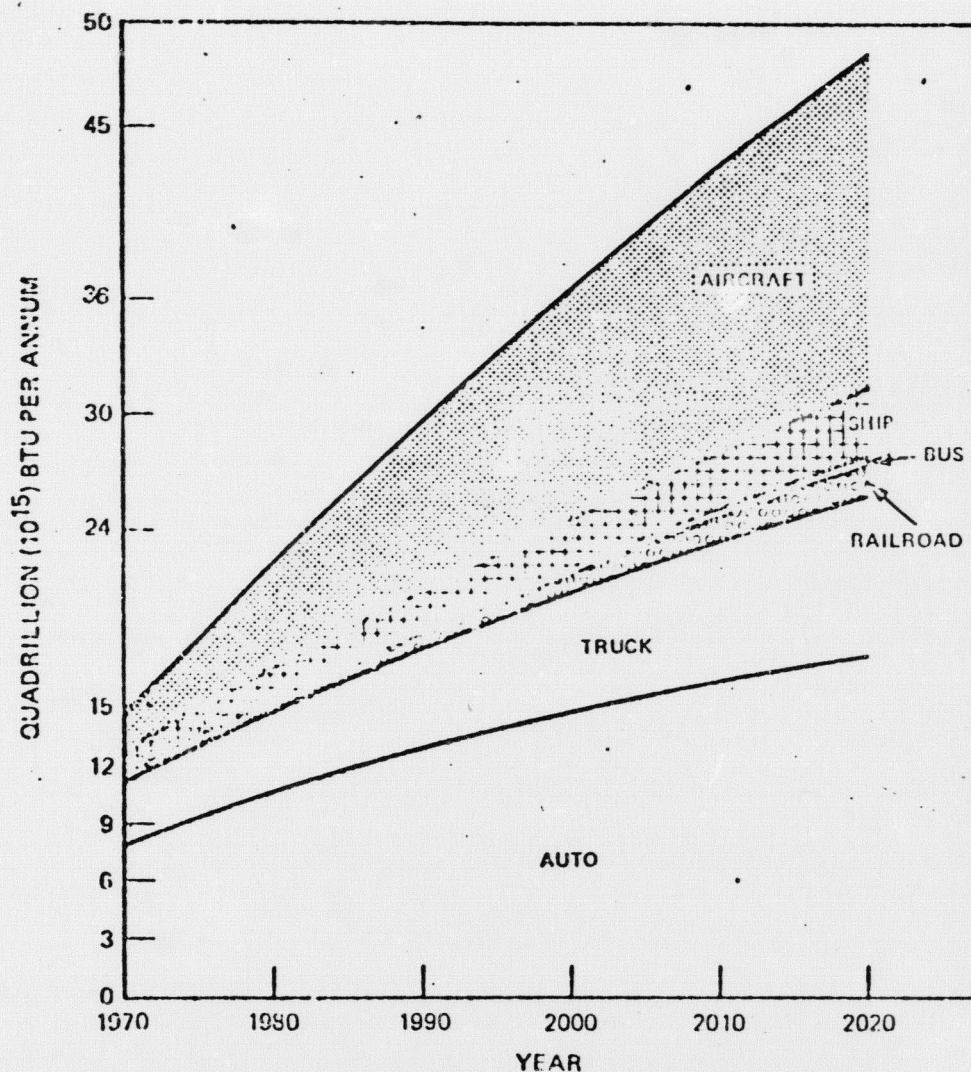


Figure 1 - Projected Transportation Energy Consumption

Source: Malliaris, A.C., and Strombotne, R.L., Demand for Energy by the Transportation Sector and Opportunities for Energy Conservation (Conference, Massachusetts Institute of Technology, Cambridge, Massachusetts, 1973), page 21.

Exhibit "C" -

Projected Transportation Energy Consumption

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE, et al.,

Plaintiffs

-against-

JOHN A VOLPE, Secretary of Transportation
of the United States, et al.,

Defendants

72-CV-254
AFFIDAVIT OF
JACK R. LEBOWITZ
IN OPPOSITION TO
DEFENDANTS' MOTIONS

Stat: of New York)

) SS:

County of Warren)

1. I am a member of the Bar of this Court, of counsel to certain of the plaintiffs, familiar with the proceedings herein, and make this affidavit in opposition to the renewed motion of the federal and state defendants to modify this Court's order of November 14, 1973 (the "November 14th Order") which enjoined federal financial participation in the construction of several uncompleted sections of a proposed Interstate highway, I-88. The preliminary injunction was granted because of defendants' failure to comply with certain applicable statutes, principally the National Environmental Policy Act of 1969 ("NEPA"), 42 USC §§ 4321 et seq.

2. If constructed, the 123 mile highway will connect Interstate 81 near Binghamton with Interstate 890 near Schenectady and is intended to provide a superhighway link between those termini. Three contiguous

sections of this project remain subject to the injunction of the November 14 Order. Unlike the partially completed "Oneonta by-pass" and Broome County segments as to which this Court dissolved the November 14th injunction on defendants' previous motions, the three sections remaining under injunction are in the planning stages only; no right-of-way has been acquired or construction begun. The three highway sections currently subject to the November 14th Order are:

a) a 45 mile section in Otsego and Schoharie counties referred to by Project Identification Numbers ("PINS") 9357.08 through 9357.17.

b] an 18 mile segment which would be the proposed eastern terminus of Interstate 88 in Schenectady County, PINs 1357.01 through 1357.04.

c) a three mile segment which would be the proposed western terminus of Interstate 88 near Port Crane in Broome County connecting the present westerly Binghamton terminus of I-88 with the present north-south Interstate 81, PIN 9357.18.

Although each section of the proposed highway identified by a separate PIN is a separate "highway project" for purposes of funding and construction, I shall hereinafter refer to the three contiguous sections of highway as identified in the above paragraph as the "highway segments" involved in the instant motion.

THE MOTIONS REQUEST PIECEMEAL RELIEF AGAIN

3. The instant motion was brought by the state defendants on April 16, 1976, and requested a modification of the November 14th order

to permit federal funding and construction approval for PIN's 9357.08-9357.17, the Otsego/Schoharie County section. Upon its return on June 28, 1976, the motion was adjourned to this date and the defendants ordered by this Court to broaden it to include the remaining unconstructed segments of I-88 as set out above, and provide supporting documentation for these sections. It was and is plaintiffs' position, apparently shared by this Court, that such an omnibus motion would allow a final resolution of all controverted issues outlined for trial at the time the preliminary injunction was granted, and is preferable to the defendant's piecemeal requests for relief on a segment-by-segment basis. Further, an omnibus motion is in accordance with the terms of the November 14 Order which envisioned a trial of the issues as to the entire highway. Such a motion is also warranted by defendants' previous statements (see e.g., Schuler Affidavit of April 12, 1976, ¶15) that they intended to move the Court presently for a dissolution of the preliminary injunction on the remaining sections, pending the imminent federal approval of the environmental impact statements ("EIS"'s) for those segments.

4. Defendants now claim that the Final EIS required by NEPA for the westerly terminus of I-88 (the I-88/I-81 connector), PIN 9357.18, will not be completed and filed for approximately nine months (Schuler Affidavit, July 27, 1976, ¶13). They have therefore renewed the April 15, 1976 motion for a modification of the November 14th order as to the Otsego/Schoharie County segments, PIN'S 9357.08-9357.17, adding thereto

the Schenectady County segments PINS 1357.01-1357.04, or, in the alternative requesting that summary judgment in defendant's favor dismissing the complaint with respect to such PINS be granted.

5. Plaintiffs oppose the defendant's instant application for piecemeal relief whether styled as a modification of the November 14th Order or summary judgment as to those PINS and respectfully request that any determination on the merits await the completion of the required impact statements for all segments subject to the November 14 Order for the reasons outlined in Paragraph 3, supra.

6. Plaintiffs respectfully disagree with the defendants' contention on this motion that consideration of whether federal requirements were properly observed on the two easterly sections of I-88 can and should be separated from consideration of the westerly terminus. Plaintiff's position on the issues outlined in the November 14th order for a trial is that:

a. The previously filed impact statements, including those involved on the instant motion, are inadequate to satisfy NEPA;

b. Their preparation was improperly delegated to the state defendants without adequate federal participation;

c. That given the inadequacy of the existing statements there can be no assurance that the statement being prepared concerning the western terminus will duly comply with federal regulations; and

d. That the segmental EIS submission procedure impedes the environmental analysis of the project as a whole under NEPA, which

impediment has not been cured or mooted by the preparation of the patently inadequate "comprehensive overview" of the I-88 project prepared by some of the defendants.

7. Given plaintiffs' position, granting defendants the piecemeal relief requested on the easterly sections of I-88 before an ultimate resolution of whether the I-88 project comports with NEPA would unfairly prejudice plaintiffs, since such an action would create a coercive pressure irresistibly tilting the equities toward completing the entire I-88 project as proposed. Such completion would be without regard to the merits of the overall project or the I-81 interconnection, which must be considered under NEPA.

8. In their renewed motion to begin construction of the eastern segments of I-88 before environmental studies of the western terminus are completed, defendants advance a number of rationales purporting to show the irrelevance of the western terminus of I-88 to the issues concerning the two easternmost segments (see Schuler Affidavit of July 27, 1976 ¶6-14). Plaintiffs, however, believe that I-88's western terminus is integrally related to the remainder of the proposed expressway and should be so considered upon this motion. For this purpose it is irrelevant that, as defendants claim, the I-88/I-81 connector would also serve local needs in the city of Binghamton or that the alternative ultimate termination of the expressway in the city of Binghamton or in a direct junction with another interstate would both be "logical" choices. For the purposes

of evaluating I-88's overall impact it makes a great difference whether or not this proposed interstate will connect directly with the interstate highway network or terminate in a city. The description and consideration of alternative termini of I-88 was not undertaken in the "comprehensive overview" EIS prepared by Defendants, which document purports to assess the overall impact of the entire 123 mile route. Such evaluation of the alternative western termini awaits the completion of the specific EIS for the I-88/I-81 connector, similar to the procedure undertaken in the study of the eastern terminus in the Schenectady County segment EIS. FHWA regulations and the most recent Supreme Court pronouncement on the "segmentation" issue (See Kleppe v. Sierra Club, ___ U.S. ___, 49 L. Ed. 2d 576 (1976)) require that the overall impact of geographically contiguous federal projects built in phased stages be assessed and alternatives evaluated at the outset. Defendants have admitted by their preparation of the "comprehensive overview" EIS that all of the individual I-88 segments are an integrally related project, but they have as yet not located the western terminus or complied with the federal requirements applicable to that decision.

9. If I-88 is properly considered as an indivisible, integral federal project for NEPA purposes, this characterization conflicts with defendants' argument that the consideration of alternative western terminus plans may be split off from the remainder of the highway and considered later as a separate project serving local needs and having

only local impact. Considering the interconnection of two major interstate highways themselves linked into an overall superhighway network has implications for environmental impact which go far beyond the short length of highway involved or its impact on its immediate surroundings. The FHWA regulations implementing NEPA at 23 CFR §771.5(a) recognize that the impact of a short segment which completes a gap in a highway goes far beyond the immediate vicinity of that final segment and requires a discussion of impact over the entire corridor. No such statement assessing alternative western termini has yet been attempted, nor is there any indication that the I-88/I-81 statement in preparation will satisfactorily address these concerns. These regulations further cast doubt on the reasonability of defendants' current pretense for the purposes of the instant motion, that I-88 "logically" terminates at the present westerly end of construction when the evident intention is clearly to complete the I-88/I-81 interconnection. Finally, the I-81 connector may have severe local impacts disproportionate to its short length. Unlike other sections of I-88 routed primarily through sparsely settled rural areas, this connector would be a heavily trafficked urban arterial, would require relocation of many homes and businesses, and could be expected to produce adverse impacts upon urban air quality, noise, land use, community patterns and the like. On information and belief, a major reason that the EIS for this segment still remains uncompleted is because of the complexity of addressing and planning to mitigate the local impacts that would occur should this connector be built.

DEFENDANTS STILL HAVE NOT COMPLIED WITH NEPA

10. The central issue in this case and on the instant motion, is that of defendants' non-compliance with NEPA. In the November 14th order, the Court framed the issues for an eventual trial on the merits thusly:

a) Whether Environmental Impact Statements should have been filed where they were not.

b) The adequacy of statements which were filed prior to this action.

c) Whether the State or Federal agency was the appropriate agency for preparation of the impact statement. (This narrow formulation of the issue has been settled by Public Law 94-83, but the question of whether Defendants have complied with the specific conditions under which Congress decided that "delegation" was permissible is very much at issue.)

d) The Court also raised the issue of whether segmental submission procedure impeded the environmental analysis function under NEPA.

11. As to the Otsego/Schoharie County and Schenectady County segments, defendants have presented environmental impact statements for each segment intended to demonstrate their present compliance with NEPA. Plaintiffs, on the defendants' prior motion for relief as to the Otsego/Schoharie sections, argued that the 1972 EIS (Exhibit 133) prepared for this segment was substantively inadequate and did

not comply with NEPA. Plaintiffs will not repeat those allegations at length in this affidavit but respectfully refer the Court to Plaintiffs' Memorandum of Law dated June 9, 1976 pages 8-23, hereby incorporated by reference.

12. As to the Schenectady County segments, defendants have presented a Final Supplemental Environmental Impact Statement dated June 14, 1976 in support of their motion. While adding some information and analysis to the earlier Otsego/Schoharie and "Comprehensive Overview" statements, this document still does not fully comply with NEPA and the applicable regulations thereunder. Many of the defects of the Otsego/Schoharie EIS -- the failure to discuss alternatives to the proposal (especially modal alternatives), an excessively narrow scope of impact ...assessment, and the unsupported... assumptions of need for future transportation capacity and the purported regional economic development benefits of the proposal -- are repeated in the Schenectady County segment. While a recitation of individual contentions as to the various deficiencies of this document is beyond the scope of this affidavit, the contentions of Brian T. Ketcham, P.E. contained in his "Supplemental Affidavit" before the Court on this motion are incorporated herein by reference. The Court is also referred to the comments of the Sierra Club and Dr. John G. New which may be found at pages 38 through 43 inclusive of the Appendix to the Schenectady County ^{supplemental} EIS, and are incorporated herein.

13. A further ground upon which defendants base their right to the requested relief on this motion is their recent preparation of a

so-called "comprehensive" impact statement. This document purports to assess the environmental impact of the entire 12³ mile I-88 project from Binghamton to the Capital District. The EIS is a 76 page subsection of the "specific" EIS prepared for the Broome County segments which were before this Court on a motion granted to defendants in January for similar relief. This final EIS was apparently approved by FHWA on February 18, 1976 with the rest of the Broome County study to which it was appended.

14. Undoubtedly defendants' interest in preparing such a "comprehensive" statement at this time was addressed to the "segmentation" issue broached by the Court in the November 14 Order: whether segmental submission procedure impeded the environmental analysis function under NEPA. Plaintiffs, and other critical of the FHWA procedures implementing NEPA, have argued that the division of a proposed interstate highway into several short projects for review purposes makes it difficult for the entire highway project's impact to be considered as a whole. Such impacts as the overall roadway's effect on the regional (as opposed to purely local) environment, economy, community patterns, land use, recreational development and natural resources therefore go unaddressed in the NEPA process. The forest, in short, is mistaken for the individual trees.

15. Had the defendants' "Comprehensive Overview" EIS adequately addressed the impacts and alternatives of the entire I-88 project as it purports to do, then there would be no impairment of NEPA's

purposes in otherwise dividing the I-88 project into several segments for more specific "local-scale" analyses. However, the "Comprehensive Overview" thoroughly fails to satisfy its stated purpose and is merely a summarization of the unsupported, self-serving conclusions contained in the Broome County and Otsego/Schoharie County segment EIS's previously prepared. Plaintiffs have previously discussed at some length the deficiencies of the so-called "Comprehensive Overview" and its failure to cure the defects which would otherwise result from analyzing the overall project on a segment-by-segment basis. The Court is referred to Plaintiffs' Memorandum of Law dated June 9, 1976 at 24 to 29. The Courts' attention is also directed to the Federal defendants exhibits G-1 and G-2 (especially "minutes" ¶7) to the Nostrand affidavit which indicate that the comprehensive statement was intended to merely summarize the existing EIS's in another form and justify the project without adding any new information.

DEFENDANTS HAVE FAILED TO SHOW
ADEQUATE FEDERAL PARTICIPATION

16. The final issue outlined in the November 14 Order is whether the State or Federal defendants are the appropriate agents for preparation of impact statements. As Plaintiffs' Memorandum of Law, supra at 29 points out, Public Law 94-83 does not materially change the Second Circuit's holdings in Greene County Planning Board v. FPC or Conservation Society v. Secretary of Transportation barring wholesale delegation. Instead, PL 94-83 was intended to clarify the

delegation holdings of existing law by substituting a standard of demonstrable federal guidance and participation for a blanket per se prohibition of delegation.

17. In order to demonstrate their compliance with PL 94-83, the federal defendants have provided the Court on this motion with several affidavits alleging substantial federal participation in the preparation of the required statements. These affidavits are accompanied by voluminous exhibits of correspondence which purport to document the allegations of required federal participation and guidance. This documentation, however, falls far short of establishing the federal defendant's allegations of substantial participation.

18. The Affidavit of William A. Nostrand, Jr. and annexed exhibits sworn to June 14, 1976 undertake to describe the federal participation in the preparation of the Otsego/Schoharie County and "Comprehensive Overview" statements. Paragraphs 7 through 28 describe an elaborate consultation procedure which allegedly is the practice of FHWA under current regulations in working with the state highway agencies towards NEPA compliance. This procedure as alleged provides for a great deal of federal guidance and participation in EIS preparation, but according to the affidavits and exhibits provided herein, this theoretical procedure was not followed in fact in this case.

19. Concerning the actual federal participation in the development of the Otsego/Schoharie County EIS, the Nostrand affidavit admits that

"While FHWA participation in the EIS preparation process was not in the depth presently required

by FHWA regulations, or so documented, there was substantial participation in the project design and development analogous to the presently required FHWA participation."

The documentation provided demonstrates in fact that there was little meaningful FHWA guidance and participation in the development of the EIS itself. Most of the correspondence provided as exhibits deals with other approvals necessary for federal highway funding such as location approval, design approval and "\$4(f)" approval (23 U.S.C. §128(f) requiring DOT approval of taking parklands for highway purposes). Only a few of the appended exhibits deal with the development of the Otsego/Schoharie EIS itself and the majority of these are merely unilluminating letters of transmittal, or correspondence dealing with the procedural mechanics of document preparation and distribution. The few letters from FHWA which facially consider the substance of the EIS itself are much like the often superficial comments made by another substantially disinterested agency reviewing an EIS covering subject matter generally outside its jurisdiction, and do not provide the requisite federal guidance, participation and independent evaluation required by law.

20. Mr. Nostrand's carefully couched position seems to be that any State-Federal contacts concerning other approvals necessary for the highway segment in question could be considered "equivalent" to federal participation in the EIS analysis. This argument obscures the statutory purposes of NEPA and the delegation guidelines pursuant to PL 94-83. These are designed to insure that environmental factors

are considered by the responsible federal decisionmakers along with traditional technical, engineering and economic factors, and to insure that a largely state-prepared EIS is not plagued with self-serving biases. As documented by the federal defendants' affidavit, the actual procedure used here provides neither assurance, since the federal defendants relied solely on a state-prepared EIS and information about the technical considerations of the project learned outside the NEPA process.

21. The Nostrand affidavit and exhibits of June 14, 1976 also seek to "document" the requisite federal participation in the development of the "Comprehensive Statement" EIS. Again, a close look at these documents leads to the opposite conclusion. Exhibits G-1 and G-2 indicate federal participation in the preparation of the draft "comprehensive" EIS only to the extent that they approved of the state defendant's plans to undertake an additional statement and delegate the preparation of this document to consultants. Although many other pieces of paper are appended to demonstrate federal participation in the comprehensive statement, a brief review will indicate that the vast majority are again merely bare transmittal letters, or concern that part of that EIS devoted specifically to the Oneonta Bypass and Broome County segments (the "comprehensive statement" was actually a 76 page insert to the specific EIS on those segments). Only a few documents could be construed to show any federal participation concerning the contents of the comprehensive EIS portion whatsoever, and these would again lead to the conclusion that the federal participation

was in reality trivial and incidental. One exhibit (G-10) documents the "Regional Multi-Disciplinary Environmental Task Force" meeting which Mr. Nostrand's affidavit (¶17-23) informs us is a key part of FHWA staff review. This meeting lasted a mere hour and twenty minutes. The meeting's minutes (Ex. G-11) and subsequent FHWA comments on the "comprehensive statement" portion of that EIS are overwhelmingly concerned with trivial technical errors made by the EIS drafters in citing names of government agencies and regulations. The other documents in Exhibit G do not materially concern the "Comprehensive Statement" portion of that EIS, and add nothing to defendants' claim of federal participation.

22. Similarly, federal defendants have provided for this motion a Supplemental Affidavit of William A. Nostrand, Jr. dated August 6, 1976 and supporting exhibit H designed to show federal participation in the development of the Capital District EIS's covering PINs 1357.01-1357.04, the Schenectady terminus. Again, most of the appended exhibits deal with federal participation in aspects of those projects other than NEPA, such as public hearings, location approval and §4(f) approval. The first document in Exhibit H which mentions any EIS at all (H-12) is the letter of transmittal of the completed draft EIS from the state defendants to the FHWA office. The documented federal "participation" is a one-line letter (H-14) from the FHWA regional office that the draft EIS is "satisfactory" and a comment from the FHWA division engineer (H-15) that

"A further discussion of the effect of air pollution on the environment surrounding I-88

would be helpful. More information concerning pollution levels...would help to emphasize that all is being done to keep the environment clean."

The documented federal input in the final EIS is again merely to supply trivial corrections and transmit papers. A somewhat different federal role however appears to have been taken concerning the subsequent preparation of a supplemental EIS necessitated by the reconsideration of several alternative termini for the Capital District segment, although Plaintiffs are unable to determine from the unilluminating papers provided by defendants, and unprepared to concede whether even that could be termed "significant" federal participation for PL 94-83 purposes.

AT MOST, ON THE "DELEGATION"
ISSUE, ALL DEFENDANTS HAVE DONE
IS TO RAISE TRIABLE ISSUES OF FACT

23. Defendants have attempted to produce documentary evidence of federal participation in the EIS preparation and evaluation which would entitle them to the requested relief of summary judgment on the face of these papers alone. Plaintiffs believe that an examination of these documents will disclose that it is more likely on the face of the papers that plaintiffs are entitled to summary judgment. At most all Defendants papers do is to show that triable issues of fact exist as to the true extent of federal participation, and that the documents themselves are hardly dispositive of the issue. We respectfully request that a summary judgment or dissolution of the injunction on this ground be denied pending an opportunity for discovery and a hearing at which the

federal defendants can be cross examined as to the allegations contained in the Nostrand affidavits.

CONCLUSION

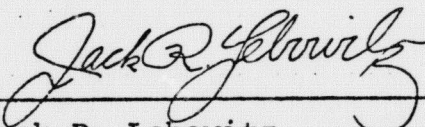
24. Defendants' motions should be denied because:

a) Defendants are still proceeding on a piecemeal, segmented basis;

b) The EIS's produced by Defendants are substantively inadequate;

c) The preparation of those EIS's appears to have been done by State defendants, or their private consultants, without any meaningful federal participation, in violation of NEPA and Public Law 94-83; and

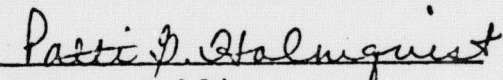
d) Unlike prior segments which have been previously released from the preliminary injunction, the remaining highway segments are in a state of planning which gives defendants no claim for equitable relief.



Jack R. Lebowitz

Sworn to before me this

10th day of September, 1976



Notary Public

PATTI G. HOLMQUIST
Notary Public, State of New York
Qualified in Saratoga County
My Commission Expires March 30, 1977
4614332

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

C. J. R.
U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

SEP 29 1976

AT O'CLOCK M.
J. R. SCULLY, Clerk
UTICA
72-CV-254

CAPITAL REGION CITIZENS COMMITTEE,
et al.,

Plaintiffs

vs.

JOHN A. VOLPE, Secretary of
Transportation of the United States,
et al.,

Defendants.

EDMUND PORT, Judge

ORDER

The defendants, Raymond T. Schuler, Commissioner of Transportation of the State of New York and Charles E. Carlson, Regional Director, New York State Department of Transportation, Region 1 (State defendants) having moved for an order modifying the order of this court dated November 14, 1973 by removing the preliminary injunction granted with respect to PINS 9357.08-.17 and 1357.01-.04 or, in the alternative, for summary judgment dismissing the complaint as to those PINS and the Secretary of Transportation of the United States and the Regional Federal Highway Administrator of the Bureau of Roads, United States Department of Transportation and Division Engineer of the Bureau of Roads, Federal Highway Administration, United States Department of Transportation (federal defendants) having appeared upon the return of said motion on September 27, 1976 at Utica, New York and having joined in said motion, and the plaintiffs having appeared through William Hoppen, Esq. and Robert Kafin, Esq. and the court having heard the attorneys for the State and federal defendants in favor of said motion and William Hoppen, Esq. in opposition to said motion and

Robert Kafin, Esq. having submitted memoranda in opposition to said motion and the court having dictated its decision on the record granting said motion, it is

ORDERED, that the State defendants' motion herein be and the same hereby is granted; and it is further

ORDERED, that the order dated November 14, 1973 be and it hereby is modified by eliminating therefrom the restraint on the grant of PS&E approval as to PINS 9357.08-.17 and 1357.01-.04 and that the injunction as to said PINS heretofore granted be and the same hereby is dissolved; and it is further

ORDERED, that partial summary judgment be entered in favor of the defendants dismissing the complaint insofar as it concerns the above-mentioned PINS.

The preliminary injunction is continued for a period of ten days from the date of entry of the order herein to permit the plaintiffs to file a notice of appeal and to apply to the Court of Appeals for a further stay.



Senior United States District Judge

Dated: September 28, 1976
Auburn, New York

FILED IN THAT
CASE NO. 76-1007

9/29/76
J. S. Sullivan

Clerk, United States District Court

By: _____
Deputy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE, THE RICHONDVILLE
PROPERTY OWNERS COMMITTEE, NEW YORK STATE COALITION
FOR SANE TRANSPORTATION, N.Y. STATE COST, TOWN OF
ROTTERDAM, ST. FRANCIS COMMANDERY HALL ASSN., INC.,
a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERG, CHESTER
& JANE SNYDER, JOHN K. & MARY E. ALDERSHOFF & GARRETT J. &
DELLA M ALDERSHOFF, WILLIAM F. & WILMA SHULTZE, ARTHUR W. &
JANICE SCOTT, ROBERT G. & MARY LOU SAWYER, DANIEL T.
& DORIS SLIP,

Plaintiffs - Appellants

vs.

72-CV-254

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION OF U.S.A.,
GERALD D. LOVE, REGIONAL FEDERAL HIGHWAY
ADMINISTRATOR OF BUREAU OF ROADS, U.S. DEPARTMENT OF
TRANSPORTATION, ROBERT E. KIRBY, DIVISION ENGINEER OF
THE BUREAU OF ROADS, FEDERAL HIGHWAY ADMINISTRATION,
UNITED STATES DEPT. OF TRANSPORTATION, THEODORE W.
PARKER, COMMISSIONER OF THE DEPT. OF TRANSPORTATION OF
THE STATE OF NEW YORK & CHARLES E. CARLSON, REGIONAL
DIRECTOR, THE NEW YORK STATE DEPT OF TRANSPORTATION,
REGION 1, and each and every one of the foregoing
individually as well as in his designated official
capacity,

Defendants - Appellees.

DECISION OF HON. EDMUND PORT, UNITED
STATES DISTRICT JUDGE, in motions in the above-entitled
matter held on the 27th day of September 1976 at the
Federal Building, Utica, New York.

APPEARANCES

ROBERT J. KAFIN, ESQ. 115 Maple
Street, Glens Falls, N.Y.
Attorney for Plaintiff, Capital Region
Citizens Committee.

WILLIAM HOPPEN, ESQ., Ardsley-on-
Hudson, New York 10503,
Attorney for Plaintiff, Richmondville
Property Owners Committee, et al.

LOUIS J. LEFKOWITZ, Attorney General
of The State of New York, for New York
State Department of Transportation,
By: Douglas S. Dales, Jr., Assistant
Attorney General.

1 THE COURT: Well, gentlemen, I am
2 proceeding without Mr. Kafin, the benefit of Mr.
3 Kafin's argument. I am sure that Mr. Hoppen has
4 adequately set forth the views of the plaintiffs,
5 that the plaintiffs, through Mr. Kafin, have set
6 forth their own views. As a matter of fact, I was
7 particularly impressed with the affidavit of
8 Mr. Kafin's associate which brushed aside a lot
9 of the trivia and laid the thing out, laid the
10 problem out for me very well, I thought, a problem
11 which, just by virtue of the magnitude of the
12 paper and print that was used, makes it difficult.
13 It is tiring on the eyes, if nothing else.

14 Now, I decided on November 14th,
15 1973 to grant preliminary injunctive relief in
16 connection with certain phases of the construction
17 of I88 because it appeared at that time to me
18 that probable issues existed concerning the
19 defendant's failure to comply with the requirements
20 of various laws. Principally, the National
21 Environmental Policy Act known as NEPA. Certain
22 segments were enjoined by prohibiting the
23 federal defendants from granting PS&E approval
24 where it had not been granted. Among those
25 segments were the two segments that we are

1 involved with now.

2 Since my initial determination,
3 motions were granted on three previous occasions
4 removing certain segments, or they are referred
5 to as Pins, different projects, sections of the
6 highway from the restraint of the preliminary
7 injunction upon a showing of compliance with law
8 by the defendants as to those segments.

9 Apparently, there was no objection
10 to those dispositions, and I only draw that
11 inference from the fact that there were no
12 appeals.

13 At the present time the only parts
14 of I88 subject to my initial injunctive provisions
15 are what has been referred to as the Otsego, Schoharie
16 segment designated as Pins 9357.08 through .17,
17 and the northeast terminus, the part that
18 connected I88 initially, I think it was, with
19 some branch of 90, and now it is with 90 itself.
20 And that is known as Pins 1357.01 through .04.

21 In addition to that northeasterly
22 end of the project, the extreme southwesterly
23 terminus is also subject to the same restraint,
24 and that was known as Pin 9357.1A.

25 The state defendants, Shure & Carson,

1 have now petitioned the Court again to remove the
2 preliminary injunction of November 14th as it
3 applies to the Otsego, Schoharie segment and the
4 northeast terminus.

5 The federal defendants, by counsel
6 in Court this morning, join in the state's motion.
7 In an affidavit filed by the federal defendants,
8 they state that they "Do not object to the granting
9 of relief sought and that the public interest will
10 be best served by granting the relief sought by
11 the state defendant."

12 They have referred to it as a
13 single defendant. That is the end of the quote.

14 I am satisfied from the voluminous
15 documents and the environmental impact statements
16 and affidavits that have been filed that the
17 requirements of all laws have been met and the
18 state defendant's motion is granted. I feel that
19 the plaintiffs whose position I referred to
20 during the argument as refreshing because it
21 seems to be an instance at least, it is rare in
22 my experience with the environmental cases, of
23 plaintiffs who aren't complaining because their
24 particular ox is being gored. Taking Mr. Hoppen,
25 as I should and as I am, at face value, it is a

1 sincere interest in seeing to the observance by
2 the state of the various laws that apply in
3 connection with the building of a highway such
4 as this and with federal cooperation and funding.
5 I feel that while it isn't necessary or even
6 advisable to write a long treatise, that a simple
7 statement of my reasons are called for and will
8 suffice.

9 Going back to my November 14th, 1973
10 order, the Pins were divided into three groups.
11 All of the Pins still subject to any restraint
12 were placed in group one. Those were Pins which
13 had not received PS&E approval. Insofar as
14 group one was concerned, the order enjoined the
15 federal defendants from granting PS&E approval.

16 I think I should back up just a bit
17 on the motion before me. The motion before me
18 at this time supplements a motion made earlier
19 by the state defendants seeking a modification of
20 the November 14th order. At that time they sought
21 to remove the restraints solely from the Otsego-
22 Schoharie segment. That motion came on for a
23 hearing on June 28th. In the course of the
24 submission of that motion, the defendants
25 indicated that they anticipated approval of impact

1 statements for the entire project very soon, and
2 that when that occurred, that they intended ng
3 a further application to the Court. It was
4 suggested at that time, I think, on argument by
5 the plaintiffs, well, if that is the case, let's
6 wrap it all up. And I adopted the suggestion,
7 and in order not to let go of the string entirely,
8 I adjourned the motion to the September motion day
9 and set dates within which the parties were to file
10 supplemental papers referring to the two segments
11 which remained outside of the plaintiff's applica-
12 tion.

13 That position was stated by counsel
14 to the plaintiff and I copied this statement down.
15 It is as follows, in the affidavit of Mr. Liebowitz,
16 and I am quoting: "It was and is plaintiff's
17 position that such an omnibus motion would allow
18 a final resolution of all controverted issues
19 outlined for trial at the time the preliminary
20 injunction was granted, and is preferable to the
21 defendant's piecemeal request for relief on a
22 segment-by-segment basis. Further, an omnibus
23 motion is in accordance with the terms of the
24 November 14th order which envisioned a trial of
25 the issues as to the entire highway."

1 The state, in accordance with the
2 schedule fixed, filed a supplemental application
3 with supporting documents to include the northeast
4 terminus segment in the requested order for
5 modification of the November 14th order, and they
6 asked in connection with the Otsego-Schoharie
7 segment and the northeast terminus segment for
8 lifting of the restraints, or in the alternative,
9 for summary judgment dismissing the complaint with
10 respect to those segments. The southwestern was
11 omitted because they state in their affidavits
12 that it would take approximately a year before they
13 are prepared to claim compliance as to that section,
14 indicating that the plan hadn't progressed
15 practically at all as to that.

16 Now, the plaintiffs contend that as
17 to the two segments that I have under consideration,
18 all of the requirements for the grant of PS&E
19 approval have been met and that the restraint
20 in connection with those segments should be
21 removed. The plaintiffs on the other hand contend
22 that the proceedings to date are so deficient
23 still that the preliminary injunction should be
24 continued and the matter go to trial after adequate
25 opportunity for discovery and interrogatories and

1 so forth.

2 The part that we are dealing with
3 now, for all practical purposes, about the easterly
4 half of the road, on examination of the papers,
5 I have concluded that the defendants have now met
6 the requirements which would permit the federal
7 defendants to consider the grant of PS&E approval.
8 Of course, it is not for the Court to issue
9 PS&E approvals. That is for the federal highway
10 agency.

11 A final environmental impact
12 statement and 4F statement for the Otsego-Schoharie
13 segment was filed by the state and received final
14 approval on August 8, 1972. A final statement
15 for the northeast terminus was approved on
16 June 14th, 1976. A comprehensive statement of
17 enviromental consideration for the entire I88
18 was made a part of the environmental impact
19 statement for the Broome County and Oneonta
20 bypass segments that were before me earlier, and
21 they were approved. The required hearings,
22 it appears, have all been held.

23 The plaintiffs start right in with
24 the basic contention that the entire I88 project
25 was illegal, that the disbursement in federal

1 funds in connection with any part of the highway
2 is illegal, that I88 violates 23 U. S. Code
3 Section 103(E3) in that it does not improve the
4 efficiency and service of the interstate system.
5 I have given little consideration to these claims.

6 On the face of it, I88 provides
7 a direct link between two principal metropolitan
8 areas of the state. That is indicated as a
9 requirement. And further, that the plaintiffs
10 can't expect to sit by initially when I failed
11 to restrain the entire project and see millions
12 of dollars poured into this project, then come
13 in later and say, I object to the millions that
14 have already been spent. It even lacks substance
15 from that viewpoint when you talk about restraint
16 of future funds on this basis. Those are
17 fundamental, basic objections that appeared as
18 clearly the day the complaint was filed, if they
19 appeared at all, as they appear today. To grant
20 that kind of relief, to accept that kind of an
21 objection would be like trying to put Humpty
22 Dumpty together again after he topples from the
23 wall.

24 Now, the plaintiffs' major objection
25 is that the NEPA has not been complied with, that

1 the statements are inadequate, tax centers on the
2 Otsego-Schoharie segment and comprehensive segment.
3 The comprehensive segment is faulted for being too
4 general and lacking in detail. But it seems to me
5 that that was the purpose, to provide the cement
6 or adhesive to hold the thing together.

7 In any event, that was before me on
8 one of the earlier motions for relief. And again,
9 that is something that could have been raised
10 and drifted off. It is claimed that the Otsego-
11 Schoharie segment was drafted at too early a
12 stage in the highway's planning and that it is
13 too vague. But I view the requirements as
14 compelling an early impact statement so that the
15 matter can be adequately considered. I am
16 certain that if it was an after-the-fact statement
17 it would find valid objection.

18 Now, they claim they are inadequate.
19 I can't, nor I don't intend to detail all of the
20 various statements that are claimed to be inadequate.
21 However, it is claimed that their inadequacy is
22 demonstrated by the criticisms found in the
23 draft statement itself by other federal departments.
24 But it seems to me again that that is what the
25 purpose of the distribution is, to give the

1 other departments an opportunity to criticize and
2 suggest. And the suggestions and the criticisms
3 were all taken up. I don't think that there is
4 any requirement necessarily that all criticisms
5 or all suggestions be followed. The fact that
6 they are considered, I think, is what is required.
7 And the very fact that they are criticized and
8 that there is give and take back and forth, I
9 think establishes that the purposes of NEPA are
10 being served and that the statements are adequate
11 in their consideration rather than lacking.

12 They also claim that the subsequent
13 statement that was filed for the northeast terminus
14 and find the northeast terminus statement to be
15 much more detailed than in other respects, but
16 the fact that the statement as to the northeast
17 terminus gets high grades doesn't mean that the
18 other one didn't get a passing grade. A passing
19 grade, as indicated by counsel for the federal
20 defendants, is determined by the Court, not by
21 agreement with the substance, but by whether or
22 not they are complied with the law.

23 The impact statements are required
24 to cover the areas mandated by NEPA. They are
25 required to insure that the highway agency's

1 consideration is neither arbitrary nor capricious,
2 but is, and now I am quoting Judge Oaks in the
3 first go-around in Vermont when he said that
4 "The consideration should be consistent with a
5 good faith weighting of the environmental impact
6 for the project."

7 I think that they pass. The volume
8 alone mitigates against inadequacy. You would have
9 to be pretty much of a genius at the use of
10 language to fill up all these pages. There must
11 be a foot of pages here on these impact statements
12 and say nothing or not comply with the things you
13 are supposed to comply with, although I haven't
14 passed on neither the papers submitted by counsel
15 nor the impact statements on the basis of weighing
16 either of them. It wasn't done on that kind of a
17 scale.

18 When we get to the claim that the
19 plaintiffs apparently are interested in getting
20 a definitive and authoritative ruling on, that
21 is the effect of Public Law 94-83, has
22 that been complied with. The plaintiffs' position
23 is, I think, the very outside position that the
24 statute enacted by Congress didn't change the
25 Second Circuit's previous law that the state agencies

1 could not compare the environmental impact state-
2 ment as that rule was enunciated in Conservation
3 Society of Southern Vermont against the Secretary,
4 508 F 2d 927, vacated and remanded in 423 U.S. 809
5 and in Green County Planning Board against
6 Federal Power Commission, 455 F 2d 412, Cert.
7 denied, 409 U.S. 849. But I think that the Second
8 Circuit's more recent statement and the latest
9 consideration is the Conservation Society of
10 Southern Vermont against Secretary in 531 F 2d 637.
11 The Second Circuit in 1976, I am quoting now,
12 "The legislative history of the enactment makes
13 it clear that the Congress intended to overturn
14 our decision in Conservation Society --"

15 The claim is made that there was
16 inadequate federal participation and guidance.
17 I have examined the papers. The papers have gone
18 back and forth like a yo-yo. I can't come to
19 that conclusion. I am led to just the opposite
20 conclusion. The environmental impact statement
21 for the northeast terminus filed extensive
22 federal participation over a period of
23 approximately five years. The federal and state
24 officials met approximately once a month for
25 about a year. I conclude that the federal

1 officials have in fact provided the necessary
2 guidance and participation contemplated by
3 NEPA. The segment argument is made again, but
4 it has less virtue now. This is being presented
5 now for the entire eastern half of I88 together
6 with this comprehensive statement for the entire
7 I88.

8 The plaintiffs, seeking not to
9 leave any stone unturned, in their papers, and
10 I refer to this because I think they are in
11 Mr. Kafin's papers, and although Mr. Hoppen has
12 virtually abandoned the position in court,
13 but the papers even seek that the motion be
14 held up pending the completion of an environmental
15 impact statement for the very short southwest
16 terminus, the Port Crane and the I88-I81 connection.
17 In my view, this is unnecessary. It is so
18 completely independent of the balance of the
19 order that I see no reason at all to hold up
20 the balance. That is almost like taking somebody
21 who is brushing a horse, tell him he can't work
22 on the head because he can't decide which way
23 the tip of the tail is going to turn. The
24 horse is there. That tip of the tail can either
25 be cut off and it won't make any difference.

1 The park land statement is objected
2 to. I think that comes under the same heading as
3 the southwest terminus. It is not leaving any
4 stone unturned. That part in its entirety, the
5 little piece that is taken is 14 acres. It
6 appears it is on the edge of this little recreation
7 area that serves no purpose at present. It won't
8 be damaged. I think it is pretty clear. The
9 park won't be disrupted by its taking. On the
10 navigability of the Susquehanna, I see a little
11 differently than even the state does. In 1975,
12 and that is the latest I have been able to
13 procure, volume 33 CFR section 2.60-5 contains
14 a determination of the Coastguard that the
15 Susquehanna River is navigable to milepost 273.5
16 terminating in the vicinity of Athens, Pennsylvania,
17 which is almost immediately south of the New York
18 State border. So that any part of the river
19 upstream from that point would of necessity be
20 not navigable.

21 There has been no proof offered
22 by the plaintiffs of the navigability of the
23 Susquehanna. They cite People against State
24 Tax Commission 116 Misc. 774(a) 1921, Supreme
25 Court, Albany County. I am not persuaded at all

1 by that case. That case dealt with a small segment
2 of the river within New York State crossed by
3 a bridge owned by the Ontario and Western Railroad
4 upon which the State Tax Commission had assessed
5 a special franchise tax. The finding concerning
6 the navigability of the Susquehanna was dicta.
7 The tax was set aside under the section of the
8 tax law excluding from such assessments crossings
9 such as this one without any regard to the
10 navigability of the stream being crossed.

11 I am convinced that on the
12 set of facts before me, particularly the failure
13 of the plaintiff to supply proof of navigability,
14 summary judgment on this question in favor of the
15 defendants is appropriate. See *River V.*
16 *Richmond Metropolitan Authority*, 359 F Sub 611,
17 640, Eastern District of Virginia, 1973, affirmed
18 on appeal, and below, 481 F 2d 1280, Fourth
19 Circuit, 1973.

20 Again, I believe in leaving no
21 stone unturned, the plaintiffs contend that the
22 hearing requirements were not met. I have
23 examined the papers and it seems to me clear
24 they have.

25 I think the time has come for the

1 courts to draw some kind of a lesson from Judge
2 Medina's concurring opinion in the Monroe County
3 case. In that opinion, if I recall correctly, he
4 made some statement about his reluctance of
5 concurring because he felt that after all the
6 t's were crossed and the i's were dotted, that
7 the same thing would result as would result before
8 without this litigation and without the injunction,
9 except that would be much delayed and much more
10 costly. And I am making no pretense of quoting
11 Judge Medina. This is strictly from my recollection,
12 but that he felt that at that time, the agencies,
13 road builders, people of that sort, paid so little
14 attention and seemingly had so little regard for
15 the Environmental Act that was passed by Congress
16 that it was necessary, in spite of the untoward
17 results, to grant an injunctive relief. In effect,
18 that was sort of a prophylactic measure.

19 Now, I think that, and I myself am
20 frank to admit, Mr. Dales knows that prophylactic
21 measure was applied by me in cases in which he
22 appeared before me. But I think the time has come
23 now where that isn't necessary. I think the
24 agencies are making a good faith effort, or at
25 least it has been demonstrated here in connection

1 with the action that has been taken to lay the
2 foundation for these motions, that they had made
3 a good faith effort and that we should look to
4 substance. And looking to substance, I think
5 there has been compliance, and that the ends of
6 justice are required, that the restraints be lifted.
7 This is a particularly good time to do that, too,
8 as I see it. Counsel have pointed out that this
9 is really the early stages, so that there is
10 little damage that can come, even if I am wrong
11 that can't be cured quickly. It can be cured
12 before there is any great expenditure even of money,
13 let alone expenditure of environmental considera-
14 tions.

15 So that I think I am pleased that
16 the motion was made at this juncture. I think
17 it affords everyone an opportunity to settle the
18 law. As far as I am concerned, I am satisfied
19 that the defendants have substantially complied
20 with all the requirements of law in relation to
21 all parts of the project except the two-mile
22 segment designated to be a southwest terminus,
23 Pin 9357.18.

24 The motion of the state defendants
25 should be granted. Preliminary injunction heretofore

1 issued restraining the grant of PS&E approval as
2 to Pins 9357.00 through .17, and 1357.01 through
3 .04 is dissolved.

4 Partial summary judgment is
5 granted dismissing those portions of the complaint
6 dealing with the above-captioned Pins.

7 In order that the plaintiffs may
8 have an opportunity to apply to the Court of
9 Appeals for a stay, I will stay the dissolution
10 or the execution of this order for a period of
11 ten days from its entry.

12 All right, thank you, gentlemen.
13 I will prepare an order and enter it with the
14 clerk and serve copies on everyone.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
et al.,

Plaintiffs

vs.

72-CV-254

JOHN A. VOLPE, Secretary of
Transportation of the United States,
et al.,

Defendants.

EDMUND PORT, Judge

STATEMENT
RULE 54(b) F.R.C.P.

An order having heretofore been made herein on September 28, 1976, and filed on September 29, 1976, dissolving a preliminary injunction and granting partial summary judgment in favor of defendants, it is hereby directed under Rule 54(b) F.R.C.P. that such order is final upon the claims therein and thereby determined and that there is no just reason for delay; and this constitutes the express direction, under Rule 54(b), of the entry of said order, for purposes of appeal therefrom, as a final judgment.

The Clerk, upon filing hereof, is directed to include and certify this statement as part of the Record on Appeal before the Court of Appeals for the Second Circuit.

3/18/77

EDMUND PORT
Senior United States District
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAPITAL REGION CITIZENS COMMITTEE,
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE,
NEW YORK STATE COALITION FOR SANE
TRANSPORTATION - N.Y. STATE COST,
TOWN OF ROTTERDAM,
ST. FRANCIS COMMANDERY HALL ASSOCIATION,
INC., a/k/a KNIGHTS OF ST. JOHN,
JOHN W. KESEBERG,
CHESTER and JANE SNYDER,
JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA M. ALDERSHOFF,
WILLIAM F. and WILMA SCHULTZE,
ARTHUR W. and JANICE SCOTT,
ROBERT G. and MARY LOU SAWYER, and
DANIEL T. and DORIS SEIF,

Plaintiffs,

-against-

JOHN A. VOLPE, Secretary of Transportation
of the United States;
GERALD D. LOVE, Regional Federal Highway
Administrator of the Bureau of Roads,
United States Department of Transportation;
ROBERT E. KIRBY, Division Engineer of the
Bureau of Roads, Federal Highway Administration,
United States Department of Transportation;
THEODORE W. PARKER, Commissioner of the
Department of Transportation of the State of
New York; and,
CHARLES E. CARLSON, Regional Director, New York
State Department of Transportation, Region 1,
And each and every one of the foregoing individually
as well as in his designated official capacity,

Defendants.

NOTICE OF
APPEAL

72-CV-254

Notice is hereby given that The Capital Region Citizens
Committee, Town of Rotterdam, John W. Keseberg, Chester and Jane Snyder,
John K. and Mary E. Aldershoff and Garrett J. and Della M. Aldershoff,
William F. and Wilma Schultze, Arthur W. and Janice Scott, Robert G.

and Mary Lou Sawyer, and Daniel T. and Doris Seip, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order of this Court granting partial summary judgment dismissing the complaint and dissolving an injunction as therein set forth, entered on the 29th day of September, 1976.

November 22, 1976

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Glens Falls, New York 12801
518-793-6631

Attorney for
Capital Region Citizens Committee
Town of Rotterdam
John W. Keseberg
Chester and Jane Snyder
John K. and Mary E. Aldershoff and
Garrett J. and Della M. Aldershoff
William F. and Wilma Schultze
Arthur W. and Janice Scott
Robert G. and Mary Lou Sawyer and
Daniel T. and Doris Seip

TO: CLERK, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
UTICA, NEW YORK 13503

Hon. Louis J. Lefkowitz,
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Attorney for Defendants
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Albany, New York 12224

Hon. James M. Sullivan
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Attorney for the Federal Defendants
U.S. Courthouse and Post Office
Albany, New York 12207

William Hoppen, Esq.
Attorney for Plaintiffs
Richmondville Property Owners Committee and
New York State Coalition for Safe Transportation
Ardsley-on-Hudson, New York 10503

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
CAPITAL REGION CITIZENS COMMITTEE, :
THE RICHMONDVILLE PROPERTY OWNERS COMMITTEE, :
NEW YORK STATE COALITION FOR SANE TRANS- :
PORTATION - N. Y. STATE COST, :
TOWN OF ROTTERDAM, :
ST. FRANCIS COMMANDERY HALL ASSOCIATION, :
INC., a/k/a KNIGHTS OF ST. JOHN, :
JOHN W. KESEBERG, :
CHESTER and JANE SNYDER, :
JOHN K. and MARY E. ALDERSHOFF and :
GARRETT J. and DELLA M. ALDERSHOFF, :
WILLIAM F. and WILMA SCHULTZE, :
ARTHUR W. and JANICE SCOTT, :
ROBERT G. and MARY LOU SAWYER, and :
DANIEL T. and DORIS SEIF, :

72-CV-254

Plaintiffs,

-against-

JOHN A. VOLPE, Secretary of Transportation :
of the United States; GERALD D. LOVE, Region- :
al Federal Highway Administrator of the Bu- :
reau of Roads, United States Department of :
Transportation; ROBERT E. KIRBY, Division :
Engineer of the Bureau of Roads, Federal :
Highway Administration, United States De- :
partment of Transportation; THEODORE W. :
PARKER, Commissioner of the Department of :
Transportation of the State of New York; and :
CHARLES E. CARLSON, Regional Director, New :
York State Department of Transportation, :
Region 1, And each and every one of the fore- :
going individually as well as in his desig- :
nated official capacity, :

Defendants.

-----x
Notice is hereby given that The Richmondville Property
Owners Committee and New York State Coalition for Sane Transport-
ation, plaintiffs above named, hereby appeal to the United States
Court of Appeals for the Second Circuit from the order of this
Court granting partial summary judgment dismissing the complaint

and dissolving an injunction as therein set forth, entered on
the 29th day of September, 1976.

November 23, 1976.

WILLIAM HOPPEN

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Attorney for

The Richmondville Property Owners
Committee and

New York State Coalition for Safe
Transportation

TO: CLERK, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
UTICA, NEW YORK 13503

COURT OF APPEALS
SECOND CIRCUIT

Capital Region Citizens Committee, et al.,

Plaintiffs-Appellants,

against

John A. Volpe, et al.,

Defendants-Respondents.

Index No.

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF Westchester

SS.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for
Plaintiffs-Appellants Richmondville Property Owners Committee and New
York State Coalition for Safe Transportation

That on the 14th day of April, 19 77 deponent served the annexed
Appendix
on

Carl Strass, Esq.
Department of Justice
Washington, D.C. 20530, and

Paul V. French, Esq.
United States Attorney
Northern District of New York
U.S. Court House and Post Office
Albany, New York 12207

Attorneys for Defendants-Appellees John A. Volpe, et al.;

Hon. Louis J. Lefkowitz
Attorney General
State of New York
The Capitol
Albany, New York 12224

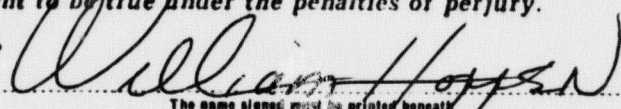
Attorney for Defendants-Appellees Raymond Schuler, et al.

attorney(s) for the respective parties as above indicated
in this action at the respective addresses

~~the address~~ designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care
and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this 14th day of April, 19 77.


The name signed must be printed beneath
William Hoppen

Attorney at Law